Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

MATIMAK TRADING COMPANY LIMITED,

Petitioner,

vs.

ALBERT KHALILY, d/b/a UNITEX MILLS, INC., and D.A.Y. KIDS SPORTSWEAR INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS A. LEGHORN
Counsel of Record
JERRY B. BLACK
MARSHALL T. POTASHNER
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER
Attorneys for Petitioner
150 East 42nd Street
New York, New York 10017-5639
(212) 490-3000

90pp

QUESTION PRESENTED

Matimak Trading Company Limited ("Matimak"), a Hong Kong corporation, commenced an action for breach of contract against a New York corporation and a citizen of New York in the United States District Court for the Southern District of New York pursuant to the court's alienage diversity jurisdiction. The district court, *sua sponte*, dismissed the action for lack of subject matter jurisdiction, which dismissal was affirmed by the United States Court of Appeals for the Second Circuit. The lower courts held that a Hong Kong corporation is not a "citizen or subject" of a "foreign state" for purposes of alienage jurisdiction as provided for under Article III of the United States Constitution and 28 U.S.C. § 1332(a)(2).

The question presented here is as follows:

Whether a corporation formed under Hong Kong law is a "citizen or subject" of a "foreign state" for purposes of Article III of the United States Constitution and 28 U.S.C. § 1332(a)(2) so as to allow a Hong Kong corporation to commence an action in United States District Court pursuant to alienage jurisdiction.

AFFILIATED PARTIES

Matimak, which is now known as Matimak Textiles Limited, has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Matimak respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 27, 1997, as corrected and amended on August 30, 1997, in order to: (1) resolve the conflict between the Seventh and Second Circuit Courts of Appeals on the important issue presented herein; and (2) address an important question of constitutional and federal law that has not been, but should be, settled by this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gives rise to this petition is reported at *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), and is also set forth in the Appendix at 1a. By order filed on September 2, 1997, the Second Circuit denied the petition for rehearing and suggestion for rehearing in banc. The Order denying the petition for rehearing and suggestion for rehearing in banc is reprinted in the Appendix at 45a. The opinion of the United States District Court for the Southern District of New York dismissing the action for lack of subject matter jurisdiction is reported at *Matimak Trading Co. v. Khalily*, 936 F. Supp. 151 (S.D.N.Y. 1996), and is set forth in the Appendix at 37a. The district court raised the issue of the court's subject matter jurisdiction, *sua sponte*, in an unreported Order dated June 10, 1996. This Order is set forth in the Appendix at 42a.

STATEMENT OF JURISDICTION

By Order entered on August 19, 1996, the United States District Court for the Southern District of New York dismissed Matimak's action for lack of subject matter jurisdiction.

Matimak timely appealed to the United States Court of Appeals for the Second Circuit, which affirmed in an opinion filed on June 27, 1997, as corrected and amended on August 30, 1997. On September 2, 1997, the Second Circuit denied Matimak's timely petition for rehearing and suggestion for rehearing in banc. Pursuant to Supreme Court Rule 13, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, cl. 1 of the United States Constitution provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[1]

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1. This section was amended by the Eleventh Amendment, which excluded jurisdiction over cases against States.

28 U.S.C. § 1332(a) provided, at the time the action was commenced, as follows:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between —
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
>
> For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.[2]

A complete copy of the United States — Hong Kong Policy Act of 1992, codified at 22 U.S.C. § 5701 *et seq.* is reprinted in the Appendix at 47a.

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2. Section 1332(a) was subsequently amended to increase the jurisdiction requirement from $50,000 to $75,000, which became effective 90 days after the enactment of the amendment (October 19, 1996).

STATEMENT OF THE CASE

This action, seeking recovery of $81,497.42, plus interest, for breach of contract, was commenced on August 17, 1995 against Albert Khalily d/b/a Unitex Mills, Inc. ("Khalily") and D.A.Y. Kids Sportswear Inc. ("D.A.Y. Kids"). Matimak is a Hong Kong corporation with its principal place of business in Hong Kong. Khalily is a citizen of the State of New York, and D.A.Y. Kids is a New York corporation with its principal place of business in New York. Matimak brought the action pursuant to 28 U.S.C. § 1332(a)(2). On October 4, 1995, a default judgment in the sum of $88,911.99 was entered in favor of Matimak and against D.A.Y. Kids. D.A.Y. Kids thereafter moved to vacate the default judgment. The district court did not address the merits of D.A.Y. Kids' motion. Rather, the court raised, *sua sponte*, the issue of the court's subject matter jurisdiction. After affording counsel an opportunity to respond to its *sua sponte* motion, the district court vacated the judgment and dismissed the complaint, reasoning that Hong Kong is not a "foreign state" for purposes of diversity jurisdiction, and, consequently, Matimak is not a "citizen or subject" of a "foreign state."

The Second Circuit, in a 2-1 majority opinion by Judge Joseph M. McLaughlin, affirmed, holding that Hong Kong is not a foreign state for purposes of diversity jurisdiction, that Hong Kong is not a political subdivision of a foreign state, and that alienage jurisdiction does not necessarily apply to all persons who are not citizens of the United States. The majority held that, for purposes of § 1332(a)(2), the definition of "foreign state" is limited to foreign states and governments formally recognized as such by the Executive Branch. Judge McLaughlin stated as follows:

> The courts must respect the role of the Executive Branch in foreign affairs, both by acknowledging its

> evaluation of a foreign entity's sovereignty, and thus international standing, and by respecting its determination as to whether a foreign entity or its government should be permitted to sue in our courts.

Matimak Trading Co. v. Khalily, 118 F.3d 76, 84 (2d Cir. 1997).

The majority further held that citizens of Hong Kong, a British Dependent Territory[3] at the time of the commencement of this action,[4] are not citizens of the United Kingdom for purposes of diversity jurisdiction. Judge McLaughlin reasoned that Matimak was incorporated under Hong Kong law, and that citizens of Hong Kong are not afforded the full status and rights of citizens of the United Kingdom. Judge McLaughlin stated as follows:

> [T]he British Nationality Act clearly distinguishes between citizens of the United Kingdom and citizens of "British Dependent Territories," who must first undergo a citizenship application procedure and fulfill certain residency requirements in the United Kingdom proper before earning British citizenship. See British Nationality Act § 4(1)(2).

Id. at 86. Thus, the majority concluded that Matimak is a stateless entity. Therefore, it does not satisfy the requirements of alienage jurisdiction and, thus, may not sue a United States citizen in federal court. *Id.* at 86.

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3. Other British Dependent Territories include the following: Anguilla, Bermuda, Cayman Islands, Falkland Islands, Gibraltar, St. Helena, Turks and Caicos Islands, and the British Virgin Islands.

4. Effective July 1, 1997, Hong Kong became a Special Administrative Region of the People's Republic of China.

Lastly, the majority held that the term "citizen or subject" of a "foreign state" does not include any and all persons who are not citizens of the United States. Judge McLaughlin reasoned that the rationale of alienage jurisdiction was to provide foreign citizens a neutral forum for dispute resolution which would "avoid entanglements with foreign states and sovereigns." *Id.* at 87. Judge McLaughlin concluded that affording "stateless" persons alienage jurisdiction does not serve this rationale and that Matimak was a "stateless" corporation.

In a dissenting opinion, Judge Frank X. Altimari argued that Matimak was a "citizen or subject" of a "foreign state" for purposes of alienage jurisdiction. Judge Altimari reasoned that "there are adequate constitutional, statutory, and prudential grounds" for (1) recognizing Hong Kong as a foreign state for purposes of diversity jurisdiction; (2) recognizing Hong Kong as a political subdivision of a foreign state; or (3) recognizing Hong Kong's peoples and corporations as "citizens or subjects" of the United Kingdom prior to July 1, 1997 and of the People's Republic of China after July 1, 1997. Any of these three positions would support alienage jurisdiction for Matimak in federal court. Judge Altimari, concluding that the majority's holding fails to consider a compelling reason for alienage jurisdiction — avoidance of foreign entanglements, stated as follows:

> Because the quintessence of alienage diversity jurisdiction is being challenged today, we risk antagonizing two world forces — the United Kingdom and China. The burgeoning global business community fosters economic interdependence and the United States cannot act without regard to the concerns of the rest of the world.

Id. at 88. Judge Altimari noted that the majority's holding forecloses access to the federal courts for citizens and subjects

of all British Dependent Territories, including citizens and subjects of Bermuda, St. Helena, Falkland Islands, British Virgin Islands, Cayman Islands, and Gibraltar. *Id.* at 88 n.1.

Judge Altimari also reasoned that "[a] stateless corporation is an oxymoron." *Id.* at 89. As he stated, corporations, by their very nature, cannot exist without the "imprimatur of the state." *Id.* at 89.

Judge Altimari recognized the danger of allowing foreign countries to control access to our federal courts by surrendering the determination of who is a "citizen or subject" to them. In this regard, Judge Altimari stated as follows:

> There is grave danger if access to our federal courts is determined by foreign law. *If we grant or deny jurisdiction based on another country's definition of its citizenry, we may unintentionally promote discrimination* against certain classes of people or entities. . . . After reversion, the citizenry of China and the right of abode will be determined according to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and the China Nationality Act. The complexity of these laws raises concern because they differentiate between ethnic and non-ethnic Chinese residents of Hong Kong leaving some to speculate whether they will become stateless.

(Emphasis supplied.) *Id.* at 90.

Judge Altimari further argued that the United States and the international community recognize Hong Kong as an autonomous political entity. *Id.* at 90. Hong Kong, he reasoned, is considered a separate foreign state for purposes of immigration

laws. Hong Kong enters into economic and trade agreements on its own behalf, and is a member of numerous international organizations. Hong Kong is a signatory of various international treaties of which the United States is also a signatory. Moreover, Judge Altimari noted that Congress enacted the Hong Kong Policy Act of 1992 to afford Hong Kong special status and to maintain its autonomous status in numerous areas of its relationship with the United States. Therefore, Judge Altimari concluded that such widespread recognition of Hong Kong as a limited purpose autonomous state justifies alienage diversity jurisdiction for Hong Kong citizens.

Lastly, Judge Altimari pointed out that, while the majority emphasized the importance of affording deference to the Executive Branch, the majority ignored the unequivocal desire of the Department of State and the Department of Justice that a citizen of Hong Kong be recognized as a citizen or subject of a foreign state for purposes of alienage diversity jurisdiction. *Id.* at 91.

Matimak's petition for rehearing and suggestion for rehearing in banc was denied.

REASONS FOR GRANTING THE WRIT

I.

THE MAJORITY OPINION FROM THE SECOND CIRCUIT DIRECTLY CONFLICTS WITH THE SEVENTH CIRCUIT'S RULING IN *WILSON*.

The decision below is in direct conflict with the Seventh Circuit's decision in *Wilson v. Humphreys (Cayman), Ltd.*, 916 F.2d 1239 (7th Cir. 1990). Therefore, certiorari is appropriate here to resolve this conflict. Sup. Ct. R. 10(a); *see Foti v.*

Immigration & Naturalization Service, 375 U.S. 217, 219-220 (1963) (certiorari granted to resolve conflicting interpretations among the circuits concerning important question of federal appellate jurisdiction).

The Seventh Circuit, in *Wilson*, held that diversity jurisdiction existed between a citizen of a state and a corporation of the Cayman Islands. The defendant therein had argued that subject matter jurisdiction was lacking because the Cayman Islands was a British colony and was not regarded as an independent sovereign. Therefore, the defendant reasoned that the Cayman Islands was not a "foreign state" as defined by 28 U.S.C. § 1332(a). The Seventh Circuit, however, held that the Cayman Islands was a "foreign state" as defined by 28 U.S.C. § 1332(a). *Wilson*, 916 F.2d at 1242-43. That court reasoned that subject matter jurisdiction over foreign citizens pursuant to § 1332(a) was intended (1) to provide the federal courts with a form of protective jurisdiction over matters implicating international relations, and (2) to limit the apprehension of legal entanglements by foreign citizens that might occur if foreign citizens were required to handle legal matters on a local, instead of federal, level. *Id.* at 1242. The Seventh Circuit noted that the Cayman Islands was a "British Dependent Territory" (British Nationality Act 1981 § 50(1)), and that a citizen of a British Dependent Territory is a "citizen of the United Kingdom and Colonies". British Nationality Act 1981 § 51(3)(a)(ii). *Id.* at 1242. The Seventh Circuit further reasoned that the Cayman Islands' legal system is patterned after that of Great Britain, that English common law has been adopted in the Cayman Islands, that the Cayman Islands are administered by a governor appointed by the British monarch, and that the United Kingdom represents the Cayman Islands' diplomatic interests and is responsible for its military defense. *Id.* at 1242. The Seventh Circuit, in holding that the Cayman Islands was a "foreign state" for purposes of diversity jurisdiction, also relied upon the Second

Circuit's decision in *Netherlands Shipmortgage Corp. v. Madia*, 717 F.2d 731, 735 (2d Cir. 1983), reasoning that "the Second Circuit concluded that alienage jurisdiction existed over a company incorporated in Bermuda, also a British Dependent Territory." *Wilson*, at 1242.

The Seventh Circuit further reasoned that the failure of the federal courts to allow Cayman Islands corporations to bring suit implicated the relationship of the United States with the United Kingdom, and stated as follows:

> Certainly, the exercise of American judicial authority over the citizens of a British Dependent Territory implicates this country's relationship with the United Kingdom — precisely the raison d'etre for applying alienage jurisdiction. Not applying alienage jurisdiction in this case would allow "form rather than substance" to govern. *Murarka v. Bachrack Bros.*, 215 F.2d 547, 552 (2d Cir. 1954) (Harlan, J.).

Wilson, 916 F.2d at 1243. In conclusion, the Seventh Circuit reasoned that the weight of authority compelled the holding that a corporation of a British colony is a subject of a "foreign state" as defined by the diversity statute. *Id.* at 1243.

The British Nationality Act of 1981 defines both the Cayman Islands and Hong Kong as "British Dependent Territories." British Nationality Act 1981 § 50(1) and Sch. 6. At the time this action was commenced, there was no distinction between the Cayman Islands and Hong Kong and their relationship to the United Kingdom. Thus, the Seventh Circuit's holding in *Wilson* is in direct conflict with the majority opinion below. *See Matimak*, 118 F.3d at 85 (Second Circuit panel acknowledges that *Wilson* is "clearly inconsistent" with its decision).

II.

THE SECOND CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The decision by the Second Circuit will have a profound effect upon the subject matter jurisdiction of the various district courts, influencing future cases and hundreds, if not thousands, of past and current cases.[5] The decision has important consequences for the foreign relations of the United States. It is an important issue affecting foreign trade and, as such, the American economy as a whole. The issue concerning the interpretation of the terms "citizen or subject" of a "foreign state" as used in Article III, § 2, cl. 1 of the United States Constitution and 28 U.S.C. § 1332(a) has never been heard by this Court. Therefore, certiorari is warranted so that this Court may address the important question of federal law raised by the decisions below. Sup. Ct. R. 10(c).

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5. The fact that the People's Republic of China, rather than the United Kingdom, now exercises sovereignty over Hong Kong should have no effect on a future determination of whether a citizen of Hong Kong is a "citizen or subject" of a "foreign state" for purposes of alienage jurisdiction. 22 U.S.C. § 5721(a). This was recognized by Judge Altimari in his dissent wherein he stated as follows:

> [R]eversion gives a Hong Kong corporation no advantage. Under the Basic Law, laws previously in force in Hong Kong shall be maintained. *See* Article 8, Basic Law . . . Therefore, a Hong Kong corporation will remain a citizen of Hong Kong after reversion and once again we sit on the horns of a dilemma.

Matimak, 118 F.3d at 90.

A. The Second Circuit's Decision Raises An Important Question Of Federal Court Subject Matter Jurisdiction.

The Second Circuit's decision will affect numerous past, present, and future cases involving Hong Kong persons and entities as well as the citizens and subjects of similarly situated foreign states. As this Court stated in *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 8 (1951), the

> prompt, economical and sound administration of justice depends to a large degree upon definite and finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts.

The Second Circuit decision is particularly problematic because it constricts the district court's subject matter jurisdiction, reducing its breadth from that previously understood by many other courts and litigants.

Neither the parties nor the court may confer subject matter jurisdiction by consent or waiver. *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *Green v. Department of Commerce*, 618 F.2d 836, 837-38 n.9 (D.C. Cir. 1980). The lack of subject matter jurisdiction may be raised by any party or the Court at any time, even, as in the case at bar, after judgment has been entered. For example, the petitioner in *American Fire & Cas. Co.* had caused the matter to be removed to federal court. The respondent attempted to have the case remanded prior to trial but was unsuccessful. After the trial in federal court, judgment was entered against the petitioner and in favor of the respondent. The petitioner thereafter moved before the district court to vacate the judgment for lack of subject matter jurisdiction, which motion was denied. Notwithstanding that it was petitioner who

first invoked federal jurisdiction through the removal petition, this Court held that the judgment must be vacated because the federal court never possessed subject matter jurisdiction over the case. *American Fire & Cas. Co.*, 341 U.S. at 17-18.

Many courts, including the Second Circuit, previously considered alienage jurisdiction to extend to British Dependent Territories and similar political entities. *Netherlands Shipmortgage Corp. v. Madia*, 717 F.2d 731, 735 (2d Cir. 1983) (Bermuda); *Wilson v. Humphreys (Cayman), Ltd.*, 916 F.2d 1239 (7th Cir. 1990) (Cayman Islands); *Tetra Finance (HK), Ltd. v. Shaheen*, 584 F. Supp. 847 (S.D.N.Y. 1984) (Hong Kong); *Refco, Inc. v. Troika Invest., Ltd.*, 702 F. Supp. 684, 685 n.2 (N.D. Ill. 1988) (Hong Kong); *Timco Engineering, Inc. v. Rex & Co.*, 603 F. Supp. 925, 930 n.8 (E.D. Pa. 1985) (Hong Kong); and *Cedec Trading, Ltd. v. United American Coal Sales, Inc.*, 556 F. Supp. 722, 724 (S.D.N.Y. 1983) (Channel Islands). In addition to these decisions specifically addressing issues of alienage jurisdiction, there are many cases which have been active for years, and cases involving judgments entered years ago, where the courts' subject matter jurisdiction is now called into question because of the majority opinion from the Second Circuit. For example, the defendant in *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 1997 U.S. Dist. LEXIS 11916 (S.D.N.Y. Aug. 11, 1997), based upon the Second Circuit's decision in *Matimak*, moved to dismiss an action pending since December 13, 1995 for lack of subject matter jurisdiction. Although the district court denied the motion as a result of the action being converted into a petition to compel arbitration and thereby invoking federal question jurisdiction, this prompt reaction to *Matimak*, wherein a defendant attempted to utilize the Second Circuit's decision to extricate itself from a matter pending for two years, exemplifies the effect it may have on a multitude of actions which were commenced years ago.

Accordingly, the question of whether citizens or subjects of Hong Kong and similar states are a "citizen or subject" of a "foreign state" for purposes of alienage jurisdiction is of fundamental importance and could have a critical impact on numerous closed and currently pending actions, as well as upon thousands of future matters that otherwise would have been brought before the federal courts. *See Tidewater Oil Co. v. United States*, 409 U.S. 151, 153 (1972) (certiorari granted to decide "important question of federal appellate jurisdiction").

B. The Second Circuit's Decision Will Have Important Consequences For The Foreign Relations Of The United States.

Judge Altimari, in his dissent, noted the consequences of the majority decision upon the United States' foreign relations. As he stated, the decision below risks "antagonizing two world forces — the United Kingdom and China." *Matimak*, 118 F.3d at 88. The United States' citizens and corporations are afforded the same rights as those of other states in the courts of Hong Kong. The negative impact upon our relations with the United Kingdom, China, and Hong Kong of now refusing, retroactively, to allow the citizens of Hong Kong the same access to federal courts as other foreign nationals has been recognized.

The effect of the majority opinion below on the United States government's foreign relations is best demonstrated by the *amicus curiae* who supported Matimak's position before the district court and the Second Circuit. In a letter to the district court, the United States Department of State declared as follows:

> Judge Wood's conclusion that federal courts lack diversity jurisdiction over cases brought by Hong Kong corporations because Hong Kong is not a foreign state within the meaning of Article III of the Constitution

> could, if maintained, *have a potentially serious adverse impact upon the conduct of the foreign and economic policies of the United States.*
>
> * * *
>
> Manifestly, matters involving Hong Kong corporations implicate international relations just as much as matters involving United Kingdom or Swiss corporations.
>
> * * *
>
> [I]t would be consistent with the foreign policy interests of the United States and the commercial interests of its nationals that courts in the United States be available to resolve private commercial claims between United States and Hong Kong nationals and business enterprises.

(Emphasis supplied.)

In a Brief for the United States as *amicus curiae*, submitted in support of Matimak's appeal to the Second Circuit, the United States Department of Justice stated the following:

> It is in the interest of the United States to maintain strong relations with Hong Kong, currently and in the future.
>
> * * *
>
> Were the United States to fail to provide a neutral forum for Hong Kong nationals suing here, the United States might face an international controversy with British authorities arising out of that failure. Any international problems faced by Hong Kong

> corporations in the United States are dealt with, at the governmental level, between United Kingdom and U.S. authorities.

Finally, the government of Hong Kong, in an *amicus curiae* brief submitted in support of Matimak's Petition for Rehearing with a Suggestion for Rehearing In Banc, stated the following:

> [B]y denying Hong Kong individuals and companies access to U.S. federal courts, *the panel's decision may place the United States in violation of treaty obligations, causing embarrassment to the Executive Branch which may be difficult or impossible to repair.*
>
> * * *
>
> This case involves an issue of fundamental importance to the Government of the Hong Kong Special Administrative Region. The Government of the Hong Kong Special Administrative Region has the strongest interest in ensuring that its individuals and corporations be permitted access to U.S. federal courts on the same terms and conditions as the individuals of other major U.S. trading partners.
>
> * * *
>
> The panel decision implicates important issues of the foreign relations of the United States. The United States consistently has identified the preservation and confirmation of Hong Kong's unique autonomous status as a fundamental policy objective.
>
> * * *

> *The panel decision also poses a grave risk of undermining on-going commercial, financial and investment initiatives of the Executive Branch and the Government of the Hong Kong Special Administrative Region.* The United States and Hong Kong have concluded bilateral agreements on Air Service, Mutual Legal Assistance, Surrender of Fugitive Offenders, and Transfer of Sentenced Persons. The United States is also in the process of negotiating bilateral agreements with Hong Kong on the promotion and protection of investments. A fundamental assumption underlying these negotiations is that the individuals and corporations of each party will have full access to the courts of the other.
>
> * * *
>
> Because Hong Kong has autonomous authority in the areas of trade and economics, denial of diversity jurisdiction in these areas *will* cause foreign entanglements. As indicated above, the panel's decision threatens to embroil the United States in complex issues arising from the potential violation of its obligations pursuant to bilateral and multilateral agreements.

(Emphasis supplied.)

Clearly, the governments of the United States and Hong Kong view the majority opinion below as a threat to the foreign relations between them.

The importance of the United States' foreign relations with Hong Kong is reflected by Congress' enactment of the United States — Hong Kong Policy Act of 1992, codified at 22 U.S.C.

§ 5701 *et seq.* The Act provides that Hong Kong "will continue to enjoy a high degree of autonomy on all matters other than defense and foreign affairs." 22 U.S.C. § 5701(1)(B). The Act further provides that there should continue to be direct bilateral ties between Hong Kong and the United States, including the maintenance of a United States Consulate-General in Hong Kong, and that Hong Kong may maintain official missions in the United States. 22 U.S.C. § 5711. As reflected in the United States — Hong Kong Policy Act of 1992, the United States has a significant foreign relationship with Hong Kong. The Second Circuit's decision raised issues which will greatly affect that relationship. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964) ("granting certiorari because the issues involved bear importantly on the conduct of the country's foreign relations"). Accordingly, this case raises a significant federal question which should be resolved by this Court.

C. The Second Circuit's Decision Will Have Important Consequences For United States Foreign Trade.

The decision below may also significantly affect the trade relations of the United States with Hong Kong, Bermuda, the Cayman Islands, and other similar international political entities. *See Commissioner v. Lincoln Sav. & Loan Asso.*, 403 U.S. 345, 346-47 (1971). As the government of Hong Kong noted in its *amicus curiae* brief,

> Hong Kong is one of the largest trading partners of the United States, with total exports to the United States of $6.9 billion and total imports from the United States of $15.5 billion in 1996, in addition to substantial investment flows.

It further stated that precluding Hong Kong citizens from alienage jurisdiction could "have a substantial destabilizing

impact on trade and investment between the United States and Hong Kong." The United States Department of State noted that "Hong Kong is now the 12th largest trading partner of the United States, with direct U.S. financial investment in Hong Kong having expanded to almost $12 billion by 1994." Thus, the Department of Justice concluded as follows:

> These strong ties, economic and otherwise, provide substantial practical justification for holding that a Hong Kong corporation can either sue or be sued in federal court under the alienage diversity provision.

The important role of Hong Kong in our economy is reflected in the United States — Hong Kong Policy Act of 1992, which provides in pertinent part as follows:

> Hong Kong plays an important role in today's regional and world economy. This role is reflected in strong economic, cultural, and other ties with the United States that give the United States a strong interest in the continued vitality, prosperity, and stability of Hong Kong.

22 U.S.C. § 5701(4). The Act further provides that

> [t]he United States should seek to maintain and expand economic and trade relations with Hong Kong and should continue to treat Hong Kong as a separate territory in economic and trade matters, such as import quotas and certificates of origin

and that "[t]he United States should continue to negotiate directly with Hong Kong to conclude bilateral economic agreements." 22 U.S.C. § 5713.

The decision below will likely have an immediate and meaningful impact upon trade between United States citizens and the citizens of Hong Kong and other similar states. Many foreigners who trade with the United States prefer the federal courts for dispute resolution. The unified federal court system is less cumbersome to foreign litigants, who, if denied access to federal courts, would have to adapt to fifty different systems. Moreover, federal courts may be perceived by foreigners as being more objective and more experienced in international business transactions than state courts.[6] Denying Hong Kong citizens access to the federal courts for dispute resolution will adversely affect United States trade with Hong Kong. That the decision below may adversely impact United States trade with Hong Kong and other similarly situated political entities is a compelling reason in favor of this Court's hearing of this appeal.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS A. LEGHORN
Counsel of Record
JERRY B. BLACK
MARSHALL T. POTASHNER
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER
Attorneys for Petitioner
150 East 42nd Street
New York, New York 10017-5639
(212) 490-3000

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6. The majority below recognized this concern as one of the rationales underlying alienage jurisdiction. *Matimak*, 118 F.3d at 83.

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JUNE 27, 1997

MATIMAK TRADING CO.,

Plaintiff-Appellant,

v.

Albert KHALILY, d/b/a Unitex Mills, Inc., and D.A.Y. Kids Sportswear Inc.

Defendants-Appellees.

No. 1251, Docket 96-9117

United States Court of Appeals
For the Second Circuit.

Argued April 22, 1997.

Decided June 27, 1997.

* * *

Before: ALTIMARI, McLAUGHLIN and JACOBS, Circuit Judges.

McLAUGHLIN, Circuit Judge.

Plaintiff appeals from an order entered August 19, 1996 in the United States District Court for the Southern District of New York (Wood, J.) dismissing plaintiff's claims for lack of subject matter jurisdiction. We review de novo the grant of the dismissal

motion. See PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1197 (2d Cir.1996).

The principal issue is whether a Hong Kong corporation is either a "citizen or subject" of a "foreign state" for purposes of alienage jurisdiction. See U.S. Const. art. III, § 2, cl. 1; 28 U.S.C. § 1332(a)(2). More precisely the issue is whether Hong Kong may be regarded as a "foreign state." We hold that it may not and, accordingly, affirm the district court.

BACKGROUND

Plaintiff Matimak Trading Co. Ltd. is a corporation organized under the laws of Hong Kong, with its principal place of business in Hong Kong. It seeks to sue Albert Khalily and D.A.Y. Kids Sportswear Inc., two New York corporations, in the Southern District of New York (Wood, J.) for breach of contract. Matimak invoked the court's diversity jurisdiction under 28 U.S.C. § 1332(a)(2), which provides jurisdiction over any civil action arising between "citizens of a State and citizens or subjects of a foreign state."

In June 1996, the district court sua sponte raised the issue of the court's subject matter jurisdiction. In August 1996, after allowing the parties to brief the issue, the district court dismissed the Complaint for lack of subject matter jurisdiction. The court concluded that Hong Kong is not a "foreign state" under the diversity statute, and, consequently, Matimak is not a "citizen or subject" of a "foreign state."

DISCUSSION

This is not the first time we have had to navigate what we have earlier described as a "shoalstrewn area of the law."

National Petrochemical Co. of Iran v. M/T Stolt Sheaf, 860 F.2d 551, 552 (2d Cir.1988).

Article III of the Constitution extends the federal judicial power to "all Cases . . . between a State, or citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2, cl. 1. The United States Judicial Code tracks the constitutional language by providing diversity jurisdiction over any civil action arising between "citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. § 1332(a)(2). This judicial power is referred to as "alienage jurisdiction." Iran Handicraft and Carpet Export Ctr. v. Marjan Int'l Corp., 655 F.Supp. 1275, 1277 (S.D.N.Y.1987), aff'd, 868 F.2d 1267 (2d Cir.1988).

British sovereignty over Hong Kong ceases on July 1, 1997, when Hong Kong becomes a special administrative region of the People's Republic of China. See 22 U.S.C. § 5701(1)(B) (West Supp.1996). Diversity of citizenship, however, is determined as of the commencement of an action. See Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co., 174 U.S. 552, 566, 19 S.Ct. 817, 822, 43 L.Ed. 1081 (1899); Smith v. Sperling, 354 U.S. 91, 93 n. 1, 77 S.Ct. 1112, 1113 n. 1, 1 L.Ed.2d 1205 (1957); Maryland Cas. Co. v. W.R. Grace and Co., 23 F.3d 617, 622 (2d Cir.1993).

Given these building blocks, we must address three principal questions: (1) whether Hong Kong is a "foreign state," such that Matimak is a "citizen or subject" of a "foreign state"; (2) whether Matimak is a "citizen or subject" of the United Kingdom, by virtue of Hong Kong's relationship with the United Kingdom when it brought suit; and (3) whether any and all non-citizens of the United States may ipso facto invoke alienage jurisdiction against a United States citizen. Although not addressed by the

parties, this last question is the focus of the dissent, and thus merits serious consideration.

I. Is Hong Kong a "Foreign State"?

A. Well-Established Principles in this Court

Neither the Constitution nor § 1332(a)(2) defines "foreign state." However, "[i]t has generally been held that a foreign state is one formally recognized by the executive branch of the United States government." 13B C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3604 (1984).

For purposes of diversity jurisdiction, a corporation is a "citizen" or "subject" of the entity under whose sovereignty it is created. See National Steamship Co. v. Tugman, 106 U.S. 118, 121, 1 S.Ct. 58, 59, 27 L.Ed. 87 (1882); Restatement (Second) of the Foreign Relations Law of the United States § 26 (1965).

The Supreme Court has never addressed the issue before us. This Court, however, has applied these general rules in addressing alienage jurisdiction on several occasions.

In Iran Handicraft and Carpet Export Center v. Marjan International Corp., 655 F.Supp. 1275 (S.D.N.Y.), aff'd, 868 F.2d 1267 (2d Cir.1988), an Iranian corporation sued a New York corporation in the Southern District of New York for breach of contract. When the complaint was filed, Iran was undergoing a revolutionary change of government. The issue was whether the court was required to find that the United States formally recognized the new government of Iran to permit the plaintiff to invoke alienage jurisdiction. See id. at 1275-76.

Appendix A

The court noted the general rule that a "foreign state" in § 1332(a)(2) is one "formally recognized by the executive branch." Id. at 1277 (citing Wright, Miller & Cooper, supra, § 3604). The court explained:

> Because the Constitution empowers only the President to "receive Ambassadors and other public Ministers," the courts have deferred to the executive branch when determining what entities shall be considered foreign states. The recognition of foreign states and of foreign governments, therefore, is wholly a prerogative of the executive branch. Thus, it is outside the competence of the judiciary to pass judgment upon executive branch decisions regarding recognition.

Id. (citations omitted).

The court surveyed the case law, concluding that "[i]n cases involving parties claiming to be citizens of a foreign state, . . . courts have focused on whether the foreign state was recognized by the United States as 'a free and independent sovereign.' " Id. at 1278 (quoting Windert Watch Co. v. Remex Elecs. Ltd., 468 F.Supp. 1242, 1244 (S.D.N.Y.1979)). This description is consistent with the accepted definition of a "state" in international law, which requires that the entity have a " 'defined territory' " and be " 'under the control of its own government.' " National Petrochemical Co. of Iran v. M/T Stolt Sheaf, 860 F.2d 551, 553 (2d Cir.1988) (quoting Restatement (Third) of the Foreign Relations Law of the United States § 201 (1987)). Relying on the State Department's clarification of Iran's diplomatic status, the Iran Handicraft court concluded that "it is beyond doubt that the United States continues to recognize Iran as an independent sovereign nation." 655 F.Supp. at 1280 & n. 4.

Appendix A

The parties here agree that the United States has not formally recognized Hong Kong as a foreign state. Invoking the jurisprudence of this Court and others, however, Matimak contends that Hong Kong has received "de facto" recognition as a foreign state by the United States, and thus its citizens may invoke alienage jurisdiction. Matimak points to the United States' diplomatic and economic ties with Hong Kong as evidence of this recognition.

This Court established the doctrine of de facto recognition in Murarka v. Bachrack Brothers, Inc., 215 F.2d 547 (2d Cir.1954). In that case a partnership doing business in New Delhi, India sued a New York corporation. The court ruled that it had alienage jurisdiction despite the fact that the complaint was filed thirty days before the United States formally recognized India as a foreign state. The court explained:

> True, as of July 14, 1947 our Government had not yet given India de jure recognition, but its exchange of ambassadors in February and April 1947 certainly amounted at least to de facto recognition, if not more. To all intents and purposes, these acts constituted a full recognition of the Interim Government of India at a time when India's ties with Great Britain were in the process of withering away, which was followed a month later, when partition took place between India and Pakistan, by the final severance of India's status as a part of the British Empire. . . . Unless form rather than substance is to govern, we think that in every substantial sense by the time this complaint was filed India had become an independent international entity and was so recognized by the United States.

Id. at 552 (citation omitted).

This analysis might reasonably be regarded as nothing more than an acknowledgment of the United States' imminent formal recognition of a sovereign state. The analogy of Hong Kong to India is inapt. India, which had been a colony of Great Britain, was about to become an independent sovereign nation. Not so for Hong Kong, which is about to be absorbed into China.[1]

Matimak, of course, argues for a more flexible interpretation of the de facto test. At the very least, however, as Iran Handicraft noted, the de facto test depends heavily on whether the Executive Branch regards the entity as an "independent sovereign nation." 655 F.Supp. at 1278. It is beyond cavil that "[w]ho is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government." Jones v. United States, 137 U.S. 202, 212, 11 S.Ct. 80, 83, 34 L.Ed. 691 (1890); see Vermilya-Brown Co. v. Connell, 335 U.S. 377, 380, 69 S.Ct. 140, 142, 93 L.Ed. 76 (1948); United States ex rel. D'esquiva v. Uhl, 137 F.2d 903, 906 (2d Cir.1943).

The deference to the Executive Branch exhibited in Iran Handicraft and Murarka was similarly crucial in Calderone v. Naviera Vacuba S/A, 325 F.2d 76 (2d Cir.1963), modified on other grounds, 328 F.2d 578 (2d Cir.1964) (per curiam), where we sustained alienage jurisdiction in a suit between a Cuban corporation and an American company. The court explained:

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1. We express no view as to Hong Kong's current status, following Great Britain's transfer of sovereignty on July 1, 1997. As noted above, diversity of citizenship is determined as of the commencement of an action. Accordingly, we need not determine the status of Hong Kong, its residents, or its corporations under Chinese rule for purposes of alienage jurisdiction.

> Considerations of both international relations and judicial administration lead us to conclude that the onus is on the Department of State, or some other department of the Executive Branch, to bring to the attention of the courts its decision that permitting nationalized Cuban corporations to sue is contrary to the national interest. Since silence on the question may be highly desirable, it would not be wise for the court unnecessarily to force the Government's hand. However, in this case we need not merely rely on the maintenance of the status quo, because the Executive Branch has made its wishes known. . . . [T]he Department of Justice has urged that nationalized Cuban corporations have access to our courts with the protection of the act of state doctrine.

Id. at 77.

Courts have consistently required such deference for purposes of alienage jurisdiction. See, e.g., Abu-Zeineh v. Federal Labs., Inc., No. 91-2148, at 3-5 (W.D.Pa. Dec. 7, 1994) (holding that Palestine is not a foreign state for purposes of alienage jurisdiction, as Palestine had not been recognized by the United States as an independent, sovereign nation); Bank of Hawaii v. Balos, 701 F.Supp. 744, 746-47 (D.Haw.1988) (holding that the Republic of the Marshall Islands ("RMI") is a foreign state for purpose of alienage jurisdiction, relying on the fact that "[b]oth the Congress and the President have indicated that the RMI is henceforth to be treated as an independent sovereign"); St. Germain v. West Bay Leasing, Ltd., No. 81-CV-3945, at 4-5 (E.D.N.Y. Sept. 30, 1982) (holding that a Cayman Islands corporation may not invoke alienage jurisdiction, finding that the United States does not recognize

the Cayman Islands as an independent sovereign); Chang v. Northwestern Mem'l Hosp., 506 F.Supp. 975, 978 (N.D.Ill.1980) (holding that Taiwan is a foreign state for purposes of alienage jurisdiction, relying on a letter from a representative from the State Department confirming that Taiwanese citizens could sue in federal court); Klausner v. Levy, 83 F.Supp. 599, 600 (E.D.Va.1949) (holding that Palestine is not a foreign state for purposes of alienage jurisdiction, as Palestine had not been recognized by the United States as an independent, sovereign nation); Betancourt v. Mutual Reserve Fund Life Ass'n, 101 F. 305, 306 (C.C.S.D.N.Y.1900) (holding that Cuba is a foreign state for purposes of alienage jurisdiction, noting that the United States had recognized Cuba as "free and independent").

When Matimak brought this suit in August 1995, Hong Kong was a "British Dependent Territory," British Nationality Act 1981, Sched. 6, and was ruled by a governor appointed by the United Kingdom. As such, it maintained some independence in its international economic and diplomatic relationships, but in matters of defense and foreign affairs remained dependent on the United Kingdom.

Hong Kong is the United States' twelfth-largest trading partner, with direct United States financial investment of almost twelve billion dollars. See Letter from Jim Hergen, Assistant Legal Advisor for East Asian and Pacific Affairs, United States Department of State, to Marshall T. Potashner, Attorney for Matimak, of 6/21/96, at 3. Hong Kong's relationship with the United States was most recently manifested in the United States-Hong Kong Policy Act of 1992, 22 U.S.C. §§ 5701-32 (West Supp.1996), which makes clear that Congress desires United States-Hong Kong relations to continue after July 1, 1997, when Hong Kong becomes a special administrative region of China.

The Act states that "Hong Kong plays an important role in today's regional and world economy. This role is reflected in strong economic, cultural, and other ties with the United States that give the United States a strong interest in the continued vitality, prosperity, and stability of Hong Kong." Id. § 5701(4).

The Policy Act makes equally clear, however, that the United States does not regard Hong Kong as an independent, sovereign political entity. The Act provides that Hong Kong "will continue to enjoy a high degree of autonomy on all matters other than defense and foreign affairs," id. § 5701(1)(B), and emphasizes that only "with respect to economic and trade matters" shall the United States "continue to treat Hong Kong as a territory which is fully autonomous from the United Kingdom," id. § 5713(3). The Act points to the need to safeguard human rights during the "transition in the exercise of sovereignty over Hong Kong." Id. § 5701(6).

The United States has embraced the same position on this appeal. Having originally stated that "Hong Kong should . . . be treated in the courts of the United States as a de facto 'foreign state' " for purposes of alienage jurisdiction, Letter from Hergen to Potashner, supra, at 2, the United States reversed course. In its amicus brief, the Justice Department notes that "[t]he State Department no longer urges treatment of Hong Kong as a de facto foreign state and withdraws any reliance on this contention."[2]

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2. The Justice Department chose to inform the Court of this crucial fact in a footnote. This Court frowns on raising such important points in footnotes, either before the district court or on appeal. "The enormous volume of briefs and arguments pressed on each panel of this court at every sitting precludes our scouring through footnotes in search of some possibly meritorious point that counsel did not consider of sufficient importance to include as part of the argument." United States v. Restrepo, 986 F.2d 1462, 1463 (2d Cir.1993).

Although we need not resolve this issue here, we note that the State Department's unexplained change in stance following the district court's opinion might under different circumstances require further inquiry into its ulterior motives. Cf. National Petrochemical, 860 F.2d at 555-56 (court might boggle at "ad hoc, pro hac vice" directive of the government). No reason is apparent, and none is suggested, for refusing to defer to the State Department in this case.

The State Department's stance on appeal confirms what is already clear from the United States' dealings with Hong Kong, as evidenced in the Policy Act: it did not regard Hong Kong as an independent sovereign entity. Cf. id. (considering evidence "in the aggregate" and concluding that there is "no indication" that the government's statement of interest was "an arbitrary or ad hoc directive.").

For these reasons, it is clear that the United States did not recognize Hong Kong as a sovereign and independent international entity. Cf. id. (considering "in the aggregate" the evidence of whether the United States intended to allow the Iranian government to bring suit in diversity). Accordingly, consistent with this Court's precedent, Matimak cannot invoke alienage jurisdiction as a "citizen or subject" of Hong Kong.

Nevertheless, Matimak and the dissent question these precedents. We must address their concerns.

B. Deference to the Executive Branch: Sound Precedent

There are at least two compelling reasons for this Court to continue to defer to the Executive Branch in defining a "foreign state" for purposes of alienage jurisdiction: such deference is

consistent with (1) the purposes of alienage jurisdiction and (2) the well-established analysis for defining a "foreign state" in related jurisdictional statutes and constitutional provisions.

1. Rationales Underlying Alienage Jurisdiction

The raison d'etre of alienage jurisdiction is to avoid "entanglements with other sovereigns that might ensue from failure to treat the legal controversies of aliens on a national level." Iran Handicraft, 655 F.Supp. at 1277 (citations omitted); see Sadat v. Mertes, 615 F.2d 1176, 1186 (7th Cir.1980) (noting that the "paramount purpose" of the alienage jurisdiction provision to is avoid offense to foreign nations because of the possible appearance of injustice to their citizens); Van Der Schelling v. U.S. News & World Report, 213 F.Supp. 756, 758-61 (E.D.Pa.) (noting the drafters' emphasis on preserving peace with foreign nations, the inability of a prince or sovereign of a country to redress prejudice against one of his citizens or subjects in our courts, and their conviction that such prejudice amounts to aggression upon the sovereign), aff'd, 324 F.2d 956 (3d Cir.1963); Blair Holdings Corp. v. Rubinstein, 133 F.Supp. 496, 500 (S.D.N.Y.1955) (noting the "[a]pprehension of entanglements with other sovereigns that might ensue from failure to treat the legal controversies of aliens on a national level"); Kevin R. Johnson, "Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens," 21 Yale J. Int'l L. 1, 10-16 (1996). These "entanglements" range from war to negative commercial impacts. See Johnson, supra, at 11-14, 20.

A secondary rationale is historical. "Several states had failed to give foreigners proper protection under the treaties concluded

with England at the end of the Revolution." Henry J. Friendly, "The Historic Basis of Diversity Jurisdiction," 41 Harv. L.Rev. 483, 484 n. 6 (1927-28); see also Sadat, 615 F.2d at 1182; Blair Holdings, 133 F.Supp. at 500. "Local animosity was so great that only national tribunals could compel the enforcement of a national treaty." Friendly, 41 Harv. L.Rev. at 484 n. 6. The drafters' concern with the failure of individual states to protect foreigners under treaties is intertwined with their intent "to provide the federal courts with a form of protective jurisdiction over matters implicating international relations where the national interest was paramount." Sadat, 615 F.2d at 1182.

These rationales command deference to the Executive Branch's recognition of a foreign entity. Where the Executive Branch determines that a foreign entity is not a "sovereign," there is no threat of entanglement with a sovereign stemming from the refusal of a federal court to treat that entity's citizen in a national forum. To be sure, if an unrecognized foreign entity perceives that its citizens have been subject to bias in a state court, there may be foreign-relations repercussions. Indeed, the dissent seems particularly concerned with potential economic — and even legal — repercussions in the instant case. It is clearly the bailiwick of the Executive Branch, however, to evaluate the autonomy and resources of a foreign entity in evaluating whether the entity constitutes a sovereign and independent state; it is for the Executive Branch, not the courts, to anticipate where potential "entanglements" with such entities are appreciable enough to recognize sovereign status.

2. Definition of "Foreign State" in Related Jurisdictional Statutes

Deference to the Executive Branch for purposes of alienage jurisdiction is further warranted in light of the well-established

jurisprudence surrounding the notion of "foreign state" in other jurisdictional statutes. See 28 U.S.C. §§ 1330(a), 1332(a)(2), 1332(a)(4), and 1441(d).

The same terms used in the same statute should get the same meaning. See Bankamerica Corp. v. United States, 462 U.S. 122, 129, 103 S.Ct. 2266, 2270, 76 L.Ed.2d 456 (1983); Mohasco Corp. v. Silver, 447 U.S. 807, 826, 100 S.Ct. 2486, 2497, 65 L.Ed.2d 532 (1980).

Section 1332(a)(4) and the current § 1332(a)(2), of course, were not originally drafted together. In 1976, having revised § 1332(a)(2), Congress added § 1332(a)(4) to provide for diversity jurisdiction in suits brought by foreign states against a United States citizen. Congress chose to define the term "foreign state" in the new § 1332(a)(4) by reference to 28 U.S.C. § 1603(a). Wright, Miller & Cooper, supra, § 3604. Section 1603 uses the term "foreign state" repeatedly, but never defines it. See Morgan Guar. Trust Co. of N.Y. v. Republic of Palau, 924 F.2d 1237, 1243 (2d Cir.1991) (Section 1603 "is more descriptive than definitional"). That Congress did not at the same time define "foreign state" in § 1332(a)(2) by a similar reference to § 1603(a) suggests only that "foreign state" in § 1332(a)(2) does not include § 1603(a)'s inclusion of certain instrumentalities, political subdivisions and other state entities as a "foreign state." See Windert, 468 F.Supp. at 1246; Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui", 639 F.2d 872, 875 n. 6 (2d Cir.1981). It does not suggest that "foreign state," as undefined in § 1603 or § 1332(a)(2), should get different meanings.

This Court has ruled that, for purposes of § 1332(a)(4), a foreign state and the government that represents it must be one

" 'recognized' " by the United States. National Petrochemical, 860 F.2d at 553 (citing Pfizer Inc. v. India, 434 U.S. 308, 319-20, 98 S.Ct. 584, 591-92, 54 L.Ed.2d 563 (1978)). This holding reflects the well-established jurisprudence of the Supreme Court. See Pfizer, 434 U.S. at 319-20, 98 S.Ct. at 591-92; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410-12, 84 S.Ct. 923, 930-32, 11 L.Ed.2d 804 (1964); National City Bank of N.Y. v. Republic of China, 348 U.S. 356, 358, 75 S.Ct. 423, 425, 99 L.Ed. 389 (1955); Guaranty Trust Co. of N.Y. v. United States, 304 U.S. 126, 137, 58 S.Ct. 785, 791, 82 L.Ed. 1224 (1938); Jones v. United States, 137 U.S. 202, 212, 11 S.Ct. 80, 83, 34 L.Ed. 691 (1890); see also Land Oberoesterreich v. Gude, 109 F.2d 635, 637 (2d Cir.1940).[3]

The similar rationales underlying § 1332(a)(2) and § 1332(a)(4) should compel a similar definition of "foreign state." The courts must respect the role of the Executive Branch in foreign affairs, both by acknowledging its evaluation of a foreign entity's sovereignty, and thus international standing, and by respecting its determination as to whether a foreign entity or its government should be permitted to sue in our courts. See generally Banco Nacional, 376 U.S. at 410, 84 S.Ct. at 930.

According the same core meaning to "foreign state" in both

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3. There is thus a slight distinction between the definition of "foreign state" in these sections. See Iran Handicraft, 655 F.Supp. at 1277-78. In contrast to § 1332(a)(4), under § 1332(a)(2), "[o]nce the United States recognizes an entity as a sovereign state. . . . a subsequent withdrawal of recognition of that state's government does not effect a change in the underlying recognition of the state as an international juridical entity." Id. at 1281. The concern under § 1332(a)(4) with whether a government represents the people of a foreign state is irrelevant in determining whether the foreign state is sovereign and independent. See id.

sections of the statute in which it occurs, we defer to the Executive Branch for purposes of § 1332(a)(2).

C. Other Jurisprudence

We are not unaware that several district courts have concluded that Hong Kong is a "foreign state" for purposes of alienage jurisdiction. The district courts that have done this have done so cursorily and without benefit of briefing from the parties, see Timco Eng'g, Inc. v. Rex & Co., 603 F.Supp. 925, 930 n. 8 (E.D.Pa.1985); without any analysis, see Refco, Inc. v. Troika Inv. Ltd., 702 F.Supp. 684, 685 n. 2 (N.D.Ill.1988); or without considering the stance of the Executive Branch, see Creative Distribs., Ltd. v. Sari Niketan, Inc., No. 89 C 3614, 1989 WL 105210, at *2 (N.D.Ill. Sept. 1, 1989). These cases are uniformly unpersuasive and should be contrasted with the two Southern District of New York decisions that have addressed this issue in more detail.

In Windert Watch Co. v. Remex Electronics Ltd., 468 F.Supp. 1242, 1245 (S.D.N.Y.1979), the court held that Hong Kong was not a "foreign state" under § 1332(a)(2). The court reasoned that Hong Kong was a "Crown Colony of the United Kingdom," and was administered by a Governor appointed by the Queen and serving as her representative. Id. The court further noted that a communication sent from a representative of the State Department "confirms that the United States does not recognize Hong Kong as an independent state but rather regards it as a colony of the United Kingdom." Id. Finally, the court noted that "[t]he United States carries on no direct diplomatic dealings with Hong Kong." Id.

In Tetra Finance (HK) Ltd. v. Shaheen, 584 F.Supp. 847

(S.D.N.Y.1984), on the other hand, the court in dicta opined that a Hong Kong corporation should be entitled to invoke alienage jurisdiction. The court believed that "[i]t would seem hypertechnical to preclude Hong Kong corporations from asserting claims in our courts simply because Hong Kong has not been formally recognized by the United States as a sovereign in its own right." Id. at 848. The court explained that "[t]he commercial and cultural realities of the modern world dictate that diversity jurisdiction should be granted to certain governmental entities that have not been formally recognized." Id. (citation omitted).

Only the Windert decision conscientiously applied the standards outlined in Murarka (the Tetra court did not cite Murarka), specifically relying on the stance of the State Department in determining whether the United States had recognized Hong Kong as a foreign state. The Tetra court, in contrast, focused exclusively on the United States' economic relationship with Hong Kong, an analysis clearly inconsistent with Murarka, Calderone and this Court's affirmance in Iran Handicraft. In short, neither Tetra nor the other cases conferring alienage jurisdiction on Hong Kong corporations present compelling arguments.

In Netherlands Shipmortgage Corp. v. Madias, 717 F.2d 731, 735 (2d Cir.1983), the court concluded that a Bermuda corporation properly invoked diversity jurisdiction in a suit against a New York partnership. Netherlands, however, is unenlightening. It is unclear on what basis the court exercised jurisdiction — that is, whether Bermuda was a "foreign state" and its corporations were "citizens or subjects" thereof, or whether Bermuda corporations were "citizens or subjects" of the United Kingdom. The issues now pressed upon us were obviously not the Netherlands court's concern.

Finally, as the dissent notes, in Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239 (7th Cir.1989), the court concluded that diversity jurisdiction was proper between a United States citizen and a Cayman Islands corporation. The court failed, however, even to consider whether the United States recognized the Cayman Islands as a foreign state, see id. at 1242-43 & n. 5, and is thus clearly inconsistent with this Court's precedent, see supra Part I.

II. Is Matimak a "Citizen or Subject" of the United Kingdom?

Well-established principles — both in this Circuit and elsewhere — furnish the analytical scaffolding for determining whether Matimak is a citizen or subject of the United Kingdom. There is no question, of course, that the United States formally recognizes the United Kingdom as a sovereign international entity.

We begin with the truism that a foreign state is entitled to define who are its citizens or subjects. United States v. Wong Kim Ark, 169 U.S. 649, 668, 18 S.Ct. 456, 464, 42 L.Ed. 890 (1898) ("Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship."); Ruggiero v. Compania Peruana de Vapores "Inca Capac Yupanqui", 639 F.2d 872, 875 (2d Cir.1981); Murarka v. Bachrack Bros. Inc., 215 F.2d 547, 551-53 (2d Cir.1954); 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction 2d §§ 3604 & 3611 (1984).

It is another accepted precept that a corporation, for purposes of diversity jurisdiction, is a "citizen" or "subject" of

the entity under whose sovereignty it is created. See supra Part I.A.

In § 1332(a)(2) the terms "citizen" and "subject" do not connote a different "degree of attachment or allegiance to a foreign state." 1 James Wm. Moore et al., Moore's Federal Practice ¶ 0.75 (3d ed.1996); United States v. Wong Kim Ark, 169 U.S. 649, 663-664, 18 S.Ct. 456, 462-463, 42 L.Ed. 890 (1898) ("The term 'citizen,' as understood in our law, is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government."). Rather, the terms are meant to encompass persons living under distinct forms of government: "A monarchy has subjects; a republic has citizens." Moore, supra, ¶ 0.75.

The parties quarrel over the significance of the British Nationality Act 1981, which delineates British citizenship in detail. The Act fails to support Matimak's assertion that a Hong Kong corporation is a citizen of the United Kingdom. The Act applies only to natural persons, not corporations. The more relevant provision of British law squarely specifies that "the privileges of British nationality are not conferred on corporations formed under the laws of Hong Kong." Windert Watch Co. v. Remex Elecs. Ltd., 468 F.Supp. 1242, 1246 (S.D.N.Y.1979) (citing British Companies Act 1948 § 406).

At any rate, the British Nationality Act clearly distinguishes between citizens of the United Kingdom and citizens of "British Dependent Territories," who must first undergo a citizenship application procedure and fulfill certain residency requirements in the United Kingdom proper before earning British citizenship. See British Nationality Act 1981 § 4(1)(2).

Appendix A

The Justice Department, as amicus, argues that as a Hong Kong corporation, Matimak is governed by the Hong Kong Companies Ordinance, which is modelled on the British Companies Act 1948. The Justice Department concludes that because the ultimate sovereign authority over the plaintiff is the British Crown, Matimak should be treated as a subject of United Kingdom sovereignty for purposes of § 1332. Hong Kong corporations, however, are no more "subjects" than "citizens." See Moore, supra, ¶ 0.75.

The fact that the Hong Kong Companies Ordinance may be "ultimately traceable" to the British Crown is too attenuated a connection. Matimak was incorporated under Hong Kong law, the Companies Ordinance 1984 of Hong Kong, and is entitled to the protections of Hong Kong law only. Cf. Cedec Trading Ltd. v. United Am. Coal Sales, Inc., 556 F.Supp. 722, 723-24 & n. 2 (S.D.N.Y.1983) (holding that corporations of the Channel Islands, a province which is part of the United Kingdom proper, governed by British law, and whose foreign affairs are entirely controlled by the United Kingdom, is a citizen or subject of the United Kingdom); Compare St. Germain v. West Bay Leasing, Ltd., No. 81-CV-3945, at 6 (E.D.N.Y. Sep. 30, 1982) (holding that a corporation of the Cayman Islands, whose corporate law is clearly independent from the United Kingdom's, is not a citizen or subject of the United Kingdom).

Matimak is not a "citizen or subject" of a foreign state. It is thus stateless. And a stateless person — the proverbial man without a country — cannot sue a United States citizen under alienage jurisdiction. Kantor v. Wellesley Galleries, Ltd., 704 F.2d 1088, 1092 (9th Cir.1983); Sadat v. Mertes, 615 F.2d 1176, 1183 (7th Cir.1980); Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135, 1140 (8th Cir.1974); Shoemaker v.

Malaxa, 241 F.2d 129, 129 (2d Cir.1957) (per curiam); see also Ligi v. Regnery Gateway, Inc., 689 F.Supp. 159, 160 n. 2 (E.D.N.Y.1988); RCA Records v. Hanks, 548 F.Supp. 979, 982 (S.D.N.Y.1982).

III. Does "Citizen or Subject" in § 1332(a)(2) Describe Any and All Persons Who Are Not Citizens of the United States?

It has recently been suggested that the Founding Fathers intended to confer alienage jurisdiction over suits between a United States citizen and any other person in the world who is not a United States citizen. See Christine Biancheria, "Restoring the Right to Have Rights: Statelessness and Alienage Jurisdiction in Light of Abu-Zeineh v. Federal Laboratories, Inc., 11 Am. U.J. Int'l L. & Pol'y 195 (1996). The dissent makes the same argument, substantially adopting the analysis set forth in this commentary and arguing that the Judiciary Act, prior to its amendment in 1875, evidenced the intent of the drafters.

Even beyond its obvious rejection of well-established precedent, this argument is flawed in several respects.

One of the earliest significant Supreme Court cases emphasized that the Judiciary Act is subordinate to the Constitution. See Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14, 1 L.Ed. 720 (1800) ("[T]he judiciary act can, and must, receive a construction consistent with the Constitution."); Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 303, 3 L.Ed. 108 (1809) ("[T]he statute cannot extend the jurisdiction beyond the limits of the Constitution."). The language of the Act must therefore be considered, at best, as the equivalent of and no more than the Constitution's description of alienage jurisdiction. It

may be noted in passing that the portion of the pre-1875 Judiciary Act on which the dissent relies is notorious as poorly drafted. See Dennis J. Mahoney, "A Historical Note on Hodgson v. Bowerbank," 49 U. Chi. L.Rev. 725, 732-33 (1982).

In our analysis of what was intended by the relevant words of the Judiciary Act and Constitution, we start with the plain language. See Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 557-58, 110 S.Ct. 2126, 2130-31, 109 L.Ed.2d 588 (1990); Landreth Timber Co. v. Landreth, 471 U.S. 681, 685, 105 S.Ct. 2297, 2301, 85 L.Ed.2d 692 (1985). The diversity statute must be strictly construed. See Romanella v. Hayward, 114 F.3d 15, 16 (2d Cir.1997) (citing Healy v. Ratta, 292 U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934)). The dissent seems to agree that the plain language does not support its approach. See Biancheria, supra, at 208.

True, this plain language may be overcome if there is "a clearly expressed legislative intention [to the] contrary." Toibb v. Radloff, 501 U.S. 157, 162, 111 S.Ct. 2197, 2200, 115 L.Ed.2d 145 (1991); see Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). The legislative history here, however, fails to meet that standard.

During the Constitutional Convention of 1787, the drafters of the Constitution used the phrase "citizen or subject of a foreign state" as frequently as "alien" or "foreigner." See Kevin R. Johnson, "Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes involving Noncitizens," 21 Yale J. Int'l L. 1, 1-20 (1996). As the dissent stresses, a basic assumption of the drafters was that anyone who was not a citizen of the United States must by

definition have been subject to the power of a foreign government or sovereign. The "idea of statelessness" was simply not in their "contemplation." See Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F.2d 306, 309-10 (2d Cir.1939) ("[T]he problem of statelessness has only become acute of late years, but it promises to become increasingly more difficult as time goes on."); Blair Holdings, 133 F.Supp. at 50i (noting that "problems associated with that status [statelessness] are of recent vintage"); Biancheria, supra, at 210 (same).

The basic assumption of the framers — if indeed it was ever valid — no longer holds true: not every "foreigner" is a citizen or subject of some foreign state. As noted at the conclusion of Part II, supra, the notion of statelessness is now well embedded in international law. Accordingly, the dissent's conclusion that the drafters in the late-eighteenth century intended that all "foreigners," including stateless persons, be entitled to invoke alienage jurisdiction over a United States citizen ignores the fact that the term in 1787 did not include stateless persons — a category of people unknown to the drafters of the Constitution.

The dissent also appears to agree that the overriding rationale of alienage jurisdiction was to accord foreign citizens a neutral forum rather than a state court that might be perceived by a foreigner as biased in favor of its own citizens. This would avoid entanglements with foreign states and sovereigns. See supra Part I.B.1. According alienage jurisdiction to "stateless" persons does not serve this rationale: there is no danger of foreign entanglements, as there is no sovereign with whom the United State could be become entangled.

We should be hesitant, moreover, to hinge our analysis on

the possibility that a foreign state might define who are its citizens or subjects based on discriminatory criteria. If a foreign state has determined that a person is not entitled to citizenship it should certainly be unconcerned with that person's treatment in a court in the United States. Cf. Liakakos v. CIGNA Corp., 704 F.Supp. 583, 585 (E.D.Pa.1988) (noting that a foreign country would "ascribe little importance to one of its citizens who has become naturalized and resides in the United States"); St. Germain v. West Bay Leasing, Ltd., No. 81-CV-3945, at 6 (E.D.N.Y. Sep. 30, 1982) (noting that where a country fails to grant full citizenship to citizens of its dependencies, "this country's concern over giving possible offense to a foreign state by proving only state courts as a forum must be correspondingly less").

It might occasionally seem incongruous not to allow a stateless person to bring suit in federal court; but this does not make it inconsistent with the idea of alienage jurisdiction. The drafters' worry that foreigners not suffer prejudice in state courts reflected their concern that such prejudice might harm foreign relations; avoiding prejudice to the individual foreigners themselves was not an independent concern. See Johnson, supra, at 20 ("The motivations of the Framers may have been more pragmatic than idealistic."). At any rate, stateless persons are not totally denied an American forum; they may choose to sue in a state court. See Romanella, 114 F.3d at 16; Blair Holdings, 133 F.Supp. at 501.

Further, the term "foreign state" should be accorded a similar meaning in the related jurisdictional statutes and constitutional provisions. See supra Part I.B.2. The dissent's approach creates the paradox that "foreign state" has a meaning in § 1332(a)(4) but no meaning in § 1332(a)(2).

Finally, the dissent and Matimak suggest that alienage jurisdiction would be proper if the Court recognized Hong Kong as a "political subdivision of a foreign state." They misconstrue the diversity statute. As noted above, see supra Part I.B.2., the definition of "foreign state" set out in 28 U.S.C. § 1603(a), which includes "political subdivisions," is inapplicable to § 1332(a)(2).

CONCLUSION

Matimak is not a "citizen or subject of a foreign state," under 28 U.S.C. § 1332(a)(2), and there is no other basis for jurisdiction over Matimak's suit. The district court properly dismissed Matimak's suit for lack of subject matter jurisdiction. Accordingly, the order of the district court is affirmed.

ALTIMARI, Circuit Judge, dissenting:

In the waning days of the United Kingdom's sovereignty over Hong Kong, the majority's holding is a death knell for Hong Kong corporations seeking access to our federal courts under alienage jurisdiction. Because I believe the failure to recognize Hong Kong as a "foreign state" or as a "citizen or subject" of the United Kingdom — at this critical juncture — is contrary to the purposes of alienage jurisdiction — I respectfully dissent.

As Dorothy said in the Wizard of Oz: "if I ever go looking for my heart's desire . . . I won't look any further than my own backyard." This applies with equal force when we consider the extent to which we will open federal courts to foreigners under alienage diversity jurisdiction. We need look no further than our own Constitution.

The basis for diversity jurisdiction stems from Article III

of the Constitution, which extends judicial power, inter alia, to all cases "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2. The primary reason for diversity jurisdiction is to provide a neutral forum. Another compelling reason for establishing alienage jurisdiction is to avoid entanglements with foreign sovereigns. Providing a neutral federal forum avoids the appearance of injustice or grounds for resentment in the relations of the United States with other nations. See Hong Kong Deposit and Guar. Co. Ltd. v. Hibdon, 602 F.Supp. 1378, 1383 (S.D.N.Y.1985). Because the quintessence of alienage diversity jurisdiction is being challenged today, we risk antagonizing two world forces — the United Kingdom and China. The burgeoning global business community fosters economic interdependence and the United States cannot act without regard to the concerns of the rest of the world.

Despite the loss of Hong Kong, there are several remaining British Crown Colonies subject to direct control by the British Government.[1] Corporations in the colonies as well as other dependent territories are placed in jeopardy by the majority's holding. Currently, Great Britain opens its courts to foreign corporations. See 7(2) Halsbury's Laws of England ¶ 1786 (Lord Hailsham of St. Marylebone ed., 4th ed.1996) (referring to companies regulated by the Companies Act 1985 of Great Britain). Will this decision have an adverse effect resulting in changes to British law limiting American corporations' access to British courts?

When Congress implemented the Article III constitutional grant of authority with the Judiciary Act of 1789, it used the

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1. Bermuda, St. Helena, Falkland Islands, British Virgin Islands, Cayman Islands and Gibraltar.

terms "foreigner" and "alien" instead of "subject" and "citizen." The use of such terms strongly suggests that the Framers intended to grant access to federal courts to all aliens involved in litigation with a United States citizen. Nearly one hundred years later, Congress amended the Act to conform to the language in the Constitution. However, nowhere is there an indication that such an amendment intended to limit jurisdiction. The terms "subject" and "citizen" were used to open our courts to all foreigners despite the government under which they lived (e.g. a monarchy has "subjects;" a republic has "citizens." 15 James Wm. Moore et. al., Moore's Federal Practice ¶ 102.74 (3d ed.1997)). A person with no affiliation is "stateless" and cannot avail himself of diversity jurisdiction. This is the result that would be achieved should we refuse to recognize Hong Kong as a "subject" or "citizen" of the United Kingdom.

The idea of statelessness was not in the contemplation of the Framers and it is likely that the Framers envisioned "citizens or subjects of foreign states" to be anyone who is not a United States citizen. This reasoning was corroborated in 1833 by Justice Story when he reviewed the jurisdictional provisions of the Constitution. He wrote: " '[t]he inquiry may here be made, who are to be deemed aliens entitled to sue in the courts of the United States? The general answer is, any person who is not a citizen of the United States.' " 11 Am. U.J. Int'l L. & Pol'y 195, 211 (quoting 2 Joseph Story, Commentaries on the Constitution of the United States § 1700 at 499 (Melville M. Bigelow ed., 5th ed. Boston, Little, Brown & Co. 1891) (1833); The Federalist No. 80, at 588-89 (Alexander Hamilton) (B. Wright ed., 1961)). Nevertheless, our jurisprudence has heretofore barred stateless persons from access to our federal courts. Today, the majority bars stateless corporations as well.

Appendix A

A stateless corporation is an oxymoron. In the United States, a corporation cannot be created without the imprimatur of the state. This is also true in Great Britain and Hong Kong. Under British law, companies incorporated in parts of the Commonwealth outside Great Britain, without establishing a place of business in Great Britain, are governed by the corporate legislation in force in the area of incorporation. See 7(2) Halsbury's Laws of England ¶ 1781. Similarly, under Hong Kong law, companies incorporated outside Hong Kong are considered "overseas companies." Companies Ordinance 1984 of Hong Kong § 332. However, the exclusion by British law of such companies was not intended to create a "stateless corporation." Indeed, the opposite is true. The Companies Act of 1985 ensures "a home" for companies by providing that corporate nationality be associated with the country in which it was registered. See 7(1) Halsbury's Laws of England ¶ 94. As a result of such concern, a Hong kong corporation, such as Matimak, is denied access to our federal courts under alienage diversity jurisdiction because it is not a British corporation. Is it thus so easy to disavow a person or a corporate entity?

In evaluating who are the citizens of another country, this Court has held "[i]t is the undoubted right of each country to determine who are its nationals, and . . . such a determination will usually be accepted by other nations." Murarka v. Bachrack Bros. Inc., 215 F.2d 547, 553 (2d Cir.1954). However, it is time to reevaluate whether our courts should look to foreign laws to determine who are foreign citizens for purposes of United States' alienage diversity jurisdiction. We would not allow foreign law to grant privileges in the United States, why should we allow foreign law to deny privileges afforded under the Constitution? It is undisputed that the privileges of British nationality are not conferred on corporations formed under the laws of Hong Kong.

However, two things are clear: (1) Great Britain did not enact the Companies Act of 1985 in contemplation that a Hong Kong corporation would be denied access to United States' federal courts; and (2) the United States is not concerned with disputes between two foreign persons or entities. We are concerned with the disputes between our citizens and the "citizens or subjects" of foreign states.

There is grave danger if access to our federal courts is determined by foreign law. If we grant or deny jurisdiction based on another country's definition of its citizenry, we may unintentionally promote discrimination against certain classes of people or entities. Here, British law states that a Hong Kong corporation is not a "citizen" of Great Britain. Therefore, diversity jurisdiction is denied. After reversion, the citizenry of China and the right of abode will be determined according to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and the Chinese Nationality Act. The complexity of these laws raises concern because they differentiate between ethnic and non-ethnic Chinese residents of Hong Kong leaving some to speculate whether they will become stateless. See Samantha B. Whitehouse, "Status of Residents of Hong Kong After July 1, 1997," 10 Geo. Immigr. L.J. 799 (1996); "Looking to the Future with Confidence," South China Morning Post, April 13, 1996 (1996 WL 3756051); Kewalram Sital, "Why the Ethnic Minorities Deserve Better Treatment," South China Morning Post, August 29, 1993. However, reversion gives a Hong Kong corporation no advantage. Under the Basic Law, laws previously in force in Hong Kong shall be maintained. See Article 8, Basic Law. Extending the same logic used to interpret citizenship under British law — a Hong Kong corporation will be governed by the Hong Kong Companies Ordinance of 1984 and not the

Chinese Nationality Act which applies to natural persons. Therefore, a Hong Kong corporation will remain a citizen of Hong Kong after reversion and once again we sit on the horns of a dilemma. Unless we recognize Hong Kong as a limited purpose foreign state or as a political subdivision of China — alienage diversity jurisdiction will be denied.

The United States and the international community recognize Hong Kong as an autonomous force. Congress recognizes Hong Kong as a separate foreign state for the purposes of per-country numerical limitations under Section 202 of the Immigration and Naturalization Act. H.R.Rep. No. 101-723(I) at 196 (1990), reprinted in 1990 U.S.S.C.A.N. 6710. Hong Kong is: recognized as an autonomous entity in the economic and trade arena, see 22 U.S.C. § 5701 (1997)[2]; a contracting party to the General Agreement of Tariffs and Trade, see id. § 5712(3), and thereby accorded most favored nation status by the United States; considered a member country in the United States Information Agency educational exchange program, see H.R.Rep. No. 128(I), 104th Cong. § 2403 (1995); and a member of the Organization for Economic Cooperation and Development. Hong Kong is a founding member of the World Trade Organization and strongly supports an open multilateral trading system and is a member in its own right in several multilateral economic organizations including the Asia Pacific

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2. Congress enacted the Hong Kong Policy Act of 1992 to give Hong Kong special status enabling it to maintain its autonomous role in: bi-lateral agreements with the United States; participation in multilateral organizations; economic and trade matters; transportation; cultural and educational exchanges; and the application of United States law. The United States will continue to treat Hong Kong as a distinct legal entity, separate and apart from China, in all areas in which China has agreed to grant such autonomy. See 22 U.S.C. § 5701 et seq.

Economic Cooperation and the Asian Development Bank. With respect to the legislative arena and international conventions, Hong Kong has acceded to the Paris Convention on industrial property, the Berne copyright convention, and the Geneva and Paris Universal Copyright Conventions. See Department of State, 1995 and 1996 Country Reports on Economic Policy and Trade Practices (Hong Kong).

Eschewing such widespread recognition of Hong Kong as a limited purpose autonomous entity to justify alienage diversity jurisdiction, the majority also rejects the argument that a Hong Kong corporation may be recognized as a "citizen or subject" of the United Kingdom. Until reversion, Hong Kong remains a British Crown Colony. Hong Kong law is not merely traceable to Great Britain — it exists only through the Queen. The Governor of Hong Kong is appointed by the Queen. He is empowered by the Letters Patent to make laws (ordinances) for Hong Kong. However, all ordinances must be sent to England and should they be found to be defective, the Queen can disallow them. Hong Kong is a part and parcel of the Commonwealth. In fact, in multilateral fora, such as the International Telecommunications Union or the International Labor Organization, Hong Kong participates as part of the United Kingdom as it does in those conventions that only allow sovereign state participation. These are ties that bind, not strangle. For the past 155 years, Hong Kong was inexorably linked to Great Britain and should be afforded similar privileges under United States law.

There is a dearth of cases addressing this issue because our federal courts have inherently recognized Hong Kong, as well as other British Dependent Territories. This Court recognized Bermuda for purposes of diversity jurisdiction, stating:

> [t]here is no question that diversity jurisdiction exists. NSC is a Bermuda corporation with its principal place of business in Bermuda .... the statutory and constitutional requirements of diversity jurisdiction are satisfied.

Netherlands Shipmortgage Corp., Ltd. v. Madias, 717 F.2d 731, 735 (2d Cir.1983). That same year, the Southern District recognized the Channel Islands for purposes of diversity jurisdiction even though they are "not a fully integrated part of the United Kingdom." Cedec Trading Ltd. v. United Am. Coal Sales, Inc., 556 F.Supp. 722, 724 (S.D.N.Y.1983). It is interesting to note that the Cedec court recognized the Channel Islands even though they are specifically excluded as part of the United Kingdom under the Companies Act of 1948. One year later, the same court opined, in dicta, that Hong Kong is a "foreign state" for purposes of diversity jurisdiction stating: "[i]t would seem hypertechnical to preclude Hong Kong corporations from asserting claims in our courts simply because Hong Kong has not been formally recognized by the United States. . . ." Tetra Finance (HK) Ltd. v. Shaheen, 584 F.Supp. 847, 848 (S.D.N.Y.1984).

Other courts follow this line of reasoning. The Seventh Circuit held that the Cayman Islands (as a British Dependent Territory) was a "foreign state" for purposes of diversity jurisdiction. See Wilson v. Humphreys (Cayman), Ltd., 916 F.2d 1239, 1242 (7th Cir.1990) (relying on this Court's reasoning in Netherlands Shipmortgage). In Timco Engineering, Inc. v. Rex & Co., Inc., 603 F.Supp. 925, 930 n. 8 (E.D.Pa.1985) the court sua sponte found the reasoning of the Southern District of New York (in Tetra Finance (HK)) to be persuasive and held that the presence of a Hong Kong citizen (plaintiff corporation) does

not deprive the court of jurisdiction. In fact it is only Windert and its progeny[3] that urge "form" over "substance." Later cases reflect challenges to or outright rejection of Windert's reasoning.[4] But these cases, pro or con, were decided well before the full implications of reversion were realized.

The majority emphasizes the importance of affording deference to the Executive Branch. In fact, it extensively quotes from Calderone in which this Court sustained alienage diversity jurisdiction because the Executive Branch made its wishes known. Calderone, 325 F.2d at 77. In this case, the Department of State and the Department of Justice unequivocally made their wishes known — they withdrew support of de facto recognition of Hong Kong and urged this Court to recognize Hong Kong as a "citizen or subject" of the United Kingdom. Finally, although political and economic considerations are not the realm of the judiciary, the United States has strong economic and political interests in Hong Kong. See 22 U.S.C. § 5701(4); Department of State, 1996 Country Reports on Economic Policy and Trade Practices (through November 1996, Hong Kong's trade with the United States exceeded $23 billion).

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3. See St. Germain v. West Bay Leasing, Ltd., No. 81-CV-3945 (E.D.N.Y. Sept. 30, 1982); Iran Handicraft and Carpet Export Ctr. v. Marjan Int'l Corp., 868 F.2d 1267 (2d Cir.1988).

4. See Wilson, 916 F.2d at 1243 ("the force of the Windert decision has been eroded by a more recent case from the same court." (referring to Tetra Finance v. Shaheen, 584 F.Supp. 847 (S.D.N.Y.1984)); Creative Distribs., Ltd. v. Sari Niketan, Inc., No. 89 C 3614, 1989 WL 105210, at *2 (N.D.Ill. Sept. 1, 1989) ("We are not persuaded by the Court's reasoning in Windert."); Timco, 603 F.Supp. at 930 n. 8 ("The Windert decision does not . . . represent an unchallenged view of Hong Kong's status.").

Appendix A

The facts, actions and other factors discussed above, when considered in the aggregate, demonstrate an implicit willingness by Congress and an explicit request by the Executive Branch to permit a Hong Kong corporation to litigate its claims in our federal courts. Hong Kong is a unique and critical component in the scheme of international policies and global economic expansion. Access to our federal courts is justified without exceeding the boundaries of judicial authority. There are adequate constitutional, statutory and prudential grounds to open our federal courts to Matimak by: (1) recognizing Hong Kong as a "foreign state" for the limited purpose of alienage diversity jurisdiction; (2) recognizing Hong Kong as a political subdivision of a foreign state; or (3) recognizing Hong Kong's people and entities as "citizens or subjects" of the United Kingdom today and after July 1, 1997, of the People's Republic of China. Today's contrary conclusion opens the door to the very political entanglements the Constitution and § 1332 sought to avoid.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED AUGUST 22, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 CIVIL 6541 (KMW)

MATIMAK TRADING COMPANY LIMITED,

Plaintiff,

-against-

ALBERT KHALILY d/b/a UNITEX MILLS INC. and D.A.Y. KIDS SPORTSWEAR INC.,

Defendant.

JUDGMENT

Whereas the above-entitled action having been assigned to the Honorable Kimba M Wood, United States District Judge, who by Order dated June 10, 1996 invited parties to make brief submissions concerning subject matter jurisdiction, and the Court, thereafter on August 19, 1996, having rendered its Opinion (77155) and Order vacating the default against D.A.Y. Kids and dismissing the case in its entirety, it is,

ORDERED, ADJUDGED AND DECREED: That no objections having been received, the Court, pursuant to the Opinion (77155) and Order, dated August 19, 1996, vacates the default against D.A.V. Kids and dismisses the case in its entirety without prejudice to refiling in state court; accordingly, the above entitled action is removed from the Court's active docket.

Appendix B

DATED: New York, New York
August 22, 1996

JAMES M. PARKISON
Clerk of Court

BY: s/ illegible
Deputy Clerk

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED AUGUST 21, 1996

MATIMAK TRADING COMPANY LIMITED,

Plaintiff,

vs.

ALBERT KHALILY d/b/a UNITEX MILLS INC. and D.A.Y. KIDS SPORTSWEAR INC.,

Defendants.

95 Civ. 6541 (KMW)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

936 F. Supp. 151; 1996 U.S. Dist. LEXIS 12006

August 19, 1996, Decided

August 21, 1996, FILED

* * *

JUDGES: Kimba M. Wood, United States District Judge

OPINION BY: Kimba M. Wood

OPINION: OPINION AND ORDER

WOOD, D.J.

Appendix C

In an order dated June 10, 1996, I invited the parties to make brief submissions concerning the issue of subject matter jurisdiction. I have since received a letter brief from plaintiff Matimak Trading Company ("Matimak"), a corporation duly organized under the laws of Hong Kong, with its principal place of business in Wanchai, Hong Kong. For the reasons set forth below, I vacate the default judgment against defendant D.A.Y. Kids Sportswear Inc. ("D.A.Y. Kids") and dismiss the case in its entirety without prejudice to refiling in state court.

In my June 10, 1996 order, I raised, sua sponte, the issue of whether this court lacks subject matter jurisdiction because Hong Kong is not recognized by the United States as a foreign state. According to *28 U.S.C. § 1332*, which implements Article III of the United States Constitution, judicial power for diversity purposes only extends to cases "between . . . citizens of a State and citizens or subjects of a foreign state . . . ." *28 U.S.C. § 1332*.

Matimak argues, primarily based on policy considerations, that I should recognize Hong Kong as a de facto foreign state for diversity purposes under *28 U.S.C. § 1332*. These policy arguments are unavailing because it is not the role of the judiciary to recognize foreign states, but rather that is a function of the executive branch. See *Iran Handicraft & Carpet Export Center v. Marjan Int'l Corp., 655 F. Supp. 1275, 1277 (S.D.N.Y. 1987)*, aff'd without op., *868 F.2d 1267 (2d Cir. 1988)*. A court may not hear cases by citizens and corporations of a foreign entity unless the foreign state has been recognized by our government. *Land Oberoesterreich v. Gude, 109 F.2d 635, 637* (2d Cir.), cert. denied, *311 U.S. 670, 85 L. Ed. 431, 61 S. Ct. 30 (1940)*.

Matimak refers to a letter from the State Department in which Assistant Legal Adviser Jim Hergen ("Hergen") urges

this court to recognize Hong Kong as a de facto foreign state for diversity purposes. Pl. Let. Br., Ex. A. Although there are strong commercial ties between Hong Kong and the United States, the establishment of such ties does not constitute recognition of Hong Kong as a de facto foreign state by our government. In a previous letter from the State Department, also written by Hergen, submitted to this court in the case of Dunsky Limited v. Judy-Phillipine, Inc., 95 Civ. 2035 (KMW), dated April 4, 1995, Hergen confirmed that the United States does not recognize Hong Kong as a sovereign state.

In *Murarka v. Bachrack Bros., 215 F.2d 547 (2d Cir. 1954)*, the Second Circuit recognized India as a de facto foreign state for diversity purposes, because at the time the complaint was filed in that case, India was substantially a foreign state. Matimak argues on the basis of Murarka that I should recognize Hong Kong as a de facto foreign state for diversity purposes. This argument is unavailing given that the circumstances of India at the time of the Murarka decision and present-day Hong Kong are distinguishable. At the time the complaint was filed in the Murarka case, only four days before the Indian Independence Act took effect, an Interim Indian Government had already been established in anticipation of the political separation of India from Great Britain. The United States had already taken steps to recognize India as an independent nation with the reception of India's first ambassador and the accreditation of the first United States Ambassador to India. *Murarka, 215 F.2d at 551-52*. Because the official recognition of India as a foreign state was imminent, the court wrote that, "in every substantial sense by the time this complaint was filed India had become an independent international entity and was so recognized by the United States." *Murarka, 215 F.2d at 552*.

On July 1, 1997, Hong Kong will revert to Chinese

sovereignty. It is possible that after that reversion, Hong Kong companies will be considered to be citizens of China for the purposes of diversity jurisdiction and thus will be allowed to file suits in federal courts based on diversity jurisdiction. However, unlike in the case of India at the time of the Murarka decision, the United States has not yet taken substantial steps to recognize Hong Kong as a fully incorporated part of China. Moreover, the complaint in this case was not filed a mere four days before the change in government, as in Murarka, but rather more than one year and a half before the reversion to Chinese sovereignty.

The remaining cases cited by Matimak are either unpersuasive or irrelevant. Although the Second Circuit wrote in *Netherlands Shipmortgage Corp. v. Madias, 717 F.2d 731, 735 (2d Cir. 1983)* that there is "no question that diversity exists" in a case involving a Bermudian corporation,[1] there is no evidence in the record that subject matter jurisdiction in that case was ever raised at the district or appellate level.

Matimak also relies heavily on *Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239, 1242 (7th Cir. 1990)*, cert. denied, *499 U.S. 947, 113 L. Ed. 2d 468, 111 S. Ct. 1415 (1991)*, in which the Seventh Circuit found that diversity jurisdiction existed between a Tennessee corporation and a company incorporated in the Cayman Islands. *Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239, 1242 (7th Cir. 1990)*, cert. denied, *499 U.S. 947, 113 L. Ed. 2d 468, 111 S. Ct. 1415 (1991)*. However, I find that the reasoning behind that decision unpersuasive, because it is based primarily on policy arguments that are unavailing given the fact that the judicial branch has no power to recognize foreign states. The decision is not based on

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1. Hong Kong, Bermuda and the Cayman Islands are all British Dependant Territories.

any legal reasoning that would allow this court to circumvent the requirement under *28 U.S.C. § 1332* that a case has to be between citizens of a State and citizens or subjects of a foreign state for diversity purposes.[2]

Finally, many of the other cases cited by Matimak involved countries in circumstances different from those of Hong Kong, such as Iran, the Channel Islands, Palestine and Cuba. I conclude that those decisions are inapplicable to the question presented here.

For the reasons set forth above, I vacate the default judgment against D.A.Y. Kids and dismiss this case in its entirety without prejudice to refiling in state court.

So Ordered.
Dated: New York, New York
August 19, 1996

Kimba M. Wood

United States District Judge

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2. The Wilson court relied on a Southern District of New York case, *Tetra Finance (HK), Ltd. v. Shaheen, 584 F. Supp. 847,* (S.D.N.Y. 1984). Although the Tetra court noted in dictum that it would recognize Hong Kong as a foreign state for purposes of diversity jurisdiction, it dismissed the case for lack of jurisdiction on other grounds. *Tetra Finance v. Shaheen, 584 F. Supp. 847,* (S.D.N.Y. 1984). The Tetra court's reasoning in favor of allowing a Hong Kong company to be a party in a diversity action is also based on policy and the fact that district courts in the past have heard cases involving Hong Kong corporations, enforced Hong Kong judgments and applied Hong Kong law. *Tetra, 584 F. Supp. at 848.* I also find this reasoning unpersuasive. Although courts have entertained actions involving Hong Kong corporations and law, none of these courts expressly considered the issue of whether Hong Kong should be recognized as a de facto foreign sovereign for purposes of diversity jurisdiction.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 10, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 6541 (KMW)

MATIMAK TRADING COMPANY LIMITED,

Plaintiff,

vs.

ALBERT KHALILY d/b/a UNITEX MILLS INC. and D.A.Y. KIDS SPORTSWEAR INC.,

Defendants.

ORDER

WOOD, D.J.

Defendant D.A.Y. Kids Sportswear Inc. ("D.A.Y. Kids") moves pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to vacate the default judgment entered against it.

In bringing this action, plaintiff, Matimak Trading Company Limited ("Matimak") alleged as the sole basis for subject matter jurisdiction diversity of citizenship. The complaint asserts claims for breach of contract based on an alleged agreement between the parties, under which Matimak was to produce fabric of certain qualities and prints for the defendants, and defendants were to make certain payments to Matimak.

A complaint was filed by Matimak on August 16, 1995,

and copies of the Summons and Complaint were served upon the defendants, pursuant to Rule 4 of the Federal Rules of Civil Procedure. The legal time for pleading or otherwise defending against the complaint expired, and a default judgment in favor of Matimak was entered by this court on October 4, 1995 against D.A.Y. Kids and Albert Khalily d/b/a Unitex Mills Inc. ("Khalily").[1]

Although the issue before the court is whether or not to set aside the default judgment, and no party has raised the issue of jurisdiction, upon examination of the parties' motion papers, it came to my attention that there is no basis for federal jurisdiction over this action. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (lack of subject matter jurisdiction can be raised by a court, *sua sponte*, at any time during the case); *see also* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (1990) (same).

Matimak alleges that it is a corporation organized under the laws of Hong Kong, with its principal place of business in Wanchai, Hong Kong. Compl. ¶ 2. For purposes of diversity jurisdiction, it is necessary to determine whether Matimak is a "subject[] of a foreign state." Article III of the United States Constitution provides that "[t]he judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2, cl. 1. The statute that implements this constitutional grant of jurisdiction provides for diversity jurisdiction in "all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between . . . citizens of a State and citizens or subjects of a foreign state . . . ." 28 U.S.C. § 1332.

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1. On November 27, 1995, I "so ordered" a stipulation setting aside the default judgment entered against Khalily.

Appendix D

Because Hong Kong is a colony of the United Kingdom and not an independent state, it is not recognized as a foreign state. *Windert Watch Co. v. Remex Electronics Ltd.*, 468 F. Supp. 1242, 1244-46 (S.D.N.Y. 1979); *see also Iran Handicraft & Carpet Export Center v. Marjan Int'l Corp.*, 655 F. Supp. 1275, 1277 (S.D.N.Y. 1987) (stating that recognition of foreign state is function of executive branch, not judicial branch), *aff'd without op.*, 868 F.2d 1267 (2d Cir. 1988). Therefore, corporations organized under the laws of Hong Kong are not deemed subjects of a foreign state. *Windert*, 468 F. Supp. at 1246.

Thus, there is apparently no basis for federal jurisdiction in this case. Because I am raising the issue of jurisdiction *sua sponte*, I will defer judgment on this issue to allow the parties to make brief submissions if they so choose. Any party that would like to oppose dismissal of this complaint as against both D.A.Y. Kids and Khalily without prejudice to refiling in state court and vacating of the default judgment entered against D.A.Y. Kids on the ground that this court lacks jurisdiction, may submit a letter brief of no longer than ten pages by June 21, 1996.

So Ordered.

Dated: New York, New York
June 10, 1996

s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

A copy of this Order has been mailed to counsel for each of the parties.

APPENDIX E — DENIAL OF PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED SEPTEMBER 2, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 2nd day of September one thousand nine hundred and ninety-seven.

Dkt No: 96-9117

Matimak Trading Company Limited,

Plaintiff-Appellant,

v

Albert Khalily, d/b/a Unitex Mills, Inc., and D.A.Y. Kids Sportswear Inc.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Matimak Trading Company Limited.

Appendix E

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX F — RELEVANT STATUTES

22 U.S.C. § 5701, *et seq.*

§ 5701. Findings and declarations

The Congress makes the following findings and declarations:

(1) The Congress recognizes that under the 1984 Sino-British Joint Declaration:

(A) The People's Republic of China and the United Kingdom of Great Britain and Northern Ireland have agreed that the People's Republic of China will resume the exercise of sovereignty over Hong Kong on July 1, 1997. Until that time, the United Kingdom will be responsible for the administration of Hong Kong.

(B) The Hong Kong Special Administrative Region of the People's Republic of China, beginning on July 1, 1997, will continue to enjoy a high degree of autonomy on all matters other than defense and foreign affairs.

(C) There is provision for implementation of a "one country, two systems" policy, under which Hong Kong will retain its current lifestyle and legal, social, and economic systems until at least the year 2047.

(D) The legislature of the Hong Kong Special Administrative Region will be constituted by elections, and the provisions of the International

Appendix F

Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as applied to Hong Kong, shall remain in force.

(E) Provision is made for the continuation in force of agreements implemented as of June 30, 1997, and for the ability of the Hong Kong Special Administrative Region to conclude new agreements either on its own or with the assistance of the Government of the People's Republic of China.

(2) The Congress declares its wish to see full implementation of the provisions of the Joint Declaration.

(3) The President has announced his support for the policies and decisions reflected in the Joint Declaration.

(4) Hong Kong plays an important role in today's regional and world economy. This role is reflected in strong economic, cultural and other ties with the United States that give the United States a strong interest in the continued vitality, prosperity, and stability of Hong Kong.

(5) Support for democratization is a fundamental principle of United States foreign policy. As such, it naturally applies to United States policy toward Hong Kong. This will remain equally true after June 30, 1997.

(6) The human rights of the people of Hong Kong are of great importance to the United States and are directly relevant to United States interests in Hong Kong. A fully successful transition in the exercise of sovereignty over Hong Kong must safeguard human rights in and of themselves. Human rights also serve as a basis for Hong Kong's continued economic prosperity.

* * *

§ 5702. Definitions

For purposes of this chapter —

(1) the term "Hong Kong" means, prior to July 1, 1997, the British Dependent Territory of Hong Kong, and on and after July 1, 1997, the Hong Kong Special Administrative Region of the People's Republic of China;

(2) the term "Joint Declaration" means the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, done at Beijing on December 19, 1984; and

(3) the term "laws of the United States" means provisions of law enacted by the Congress.

* * *

Appendix F

§ 5711. Bilateral ties between United States and Hong Kong

It is the sense of the Congress that the following, which are based in part on the relevant provisions of the Joint Declaration, should be the policy of the United States with respect to its bilateral relationship with Hong Kong:

(1) The United States should play an active role, before, on, and after July 1, 1997, in maintaining Hong Kong's confidence and prosperity, Hong Kong's role as an international financial center, and the mutually beneficial ties between the people of the United States and the people of Hong Kong.

(2) The United States should actively seek to establish and expand direct bilateral ties and agreements with Hong Kong in economic, trade, financial, monetary, aviation, shipping, communications, tourism, cultural, sport, and other appropriate areas.

(3) The United States should seek to maintain, after June 30, 1997, the United States consulate-general in Hong Kong, together with other official and semi-official organizations, such as the United States Information Agency American Library.

(4) The United States should invite Hong Kong to maintain, after June 30, 1997, its official and semi-official missions in the United States, such as the Hong Kong Economic & Trade Office, the Office of the Hong Kong Trade Development Council, and the Hong Kong Tourist Association. The United States should invite Hong Kong to open and maintain other official or semi-

official missions to represent Hong Kong in those areas in which Hong Kong is entitled to maintain relations on its own, including economic, trade, financial, monetary, aviation, shipping, communications, tourism, cultural, and sport areas.

(5) The United States should recognize passports and travel documents issued after June 30, 1997, by the Hong Kong Special Administrative Region.

(6) The resumption by the People's Republic of China of the exercise of sovereignty over Hong Kong after June 30, 1997, should not affect treatment of Hong Kong residents who apply for visas to visit or reside permanently in the United States, so long as such treatment is consistent with the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.].

* * *

§ 5712. Participation in multilateral organizations, rights under international agreements, and trade status

It is the sense of the Congress that the following, which are based in part on the relevant provisions of the Joint Declaration, should be the policy of the United States with respect to Hong Kong after June 30, 1997:

(1) The United States should support Hong Kong's participation in all appropriate multilateral conferences, agreements, and organizations in which Hong Kong is eligible to participate.

(2) The United States should continue to fulfill its obligations to Hong Kong under international agreements, so long as Hong Kong reciprocates, regardless of whether the People's Republic of China is a party to the particular international agreement, unless and until such obligations are modified or terminated in accordance with law.

(3) The United States should respect Hong Kong's status as a separate customs territory, and as a contracting party to the General Agreement on Tariffs and Trade, whether or not the People's Republic of China participates in the latter organization.

* * *

§ 5713. Commerce between United States and Hong Kong

It is the sense of the Congress that the following, which are based in part on the relevant provisions of the Joint Declaration, are and should continue after June 30, 1997, to be the policy of the United States with respect to commerce between the United States and Hong Kong:

(1) The United States should seek to maintain and expand economic and trade relations with Hong Kong and should continue to treat Hong Kong as a separate territory in economic and trade matters, such as import quotas and certificates of origin.

(2) The United States should continue to negotiate directly with Hong Kong to conclude bilateral economic agreements.

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(3) The United States should continue to treat Hong Kong as a territory which is fully autonomous from the United Kingdom and, after June 30, 1997, should treat Hong Kong as a territory which is fully autonomous from the People's Republic of China with respect to economic and trade matters.

(4) The United States should continue to grant the products of Hong Kong nondiscriminatory trade treatment (commonly referred to as "most-favored-nation status") by virtue of Hong Kong's membership in the General Agreement on Tariffs and Trade.

(5) The United States should recognize certificates of origin for manufactured goods issued by the Hong Kong Special Administrative Region.

(6) The United States should continue to allow the United States dollar to be freely exchanged with the Hong Kong dollar.

(7) United States businesses should be encouraged to continue to operate in Hong Kong, in accordance with applicable United States and Hong Kong law.

(8) The United States should continue to support access by Hong Kong to sensitive technologies controlled under the agreement of the Coordinating Committee for Multilateral Export Controls (commonly referred to as "COCOM") for as long as the United States is satisfied that such technologies are protected from improper use or export.

(9) The United States should encourage Hong Kong to continue its efforts to develop a framework which provides adequate protection for intellectual property rights.

(10) The United States should negotiate a bilateral investment treaty directly with Hong Kong, in consultation with the Government of the People's Republic of China.

(11) The change in the exercise of sovereignty over Hong Kong should not affect ownership in any property, tangible or intangible, held in the United States by any Hong Kong person.

* * *

§ 5714. Transportation

It is the sense of the Congress that the following, which are based in part on the relevant provisions of the Joint Declaration, should be the policy of the United States after June 30, 1997, with respect to transportation from Hong Kong:

(1) Recognizing Hong Kong's position as an international transport center, the United States should continue to recognize ships and airplanes registered in Hong Kong and should negotiate air service agreements directly with Hong Kong.

(2) The United States should continue to recognize ships registered by Hong Kong.

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(3) United States commercial ships, in accordance with applicable United States and Hong Kong law, should remain free to port in Hong Kong.

(4) The United States should continue to recognize airplanes registered by Hong Kong in accordance with applicable laws of the People's Republic of China.

(5) The United States should recognize licenses issued by the Hong Kong to Hong Kong airlines.

(6) The United States should recognize certificates issued by the Hong Kong to United States air carriers for air service involving travel to, from, or through Hong Kong which does not invoke travel to, from, or through other parts of the People's Republic of China.

(7) The United States should negotiate at the appropriate time directly with the Hong Kong Special Administrative Region, acting under authorization from the Government of the People's Republic of China, to renew or amend all air service agreements existing on June 30, 1997, and to conclude new air service agreements affecting all flights to, from, or through the Hong Kong Special Administrative Region which do not involve travel to, from, or through other parts of the People's Republic of China.

(8) The United States should make every effort to ensure that the negotiations described in paragraph (7) lead to procompetitive air service agreements.

* * *

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§ 5715. Cultural and educational exchanges

It is the sense of the Congress that the following, which are based in part on the relevant provisions of the Joint Declaration, are and should continue after June 30, 1997, to be the policy of the United States with respect to cultural and educational exchanges with Hong Kong:

(1) The United States should seek to maintain and expand United States-Hong Kong relations and exchanges in culture, education, science, and academic research. The United States should encourage American participation in bilateral exchanges with Hong Kong, both official and unofficial.

(2) The United States should actively seek to further United States-Hong Kong cultural relations and promote bilateral exchanges, including the negotiating and concluding of appropriate agreements in these matters.

(3) Hong Kong should be accorded separate status as a full partner under the Fulbright Academic Exchange Program (apart from the United Kingdom before July 1, 1997, and apart from the People's Republic of China thereafter), with the continuation or establishment of a Fulbright Commission or functionally equivalent mechanism.

(4) The United States should actively encourage Hong Kong residents to visit the United States on nonimmigrant visas for such purposes as business, tourism, education, and scientific and academic

research, in accordance with applicable United States and Hong Kong laws.

(5) Upon the request of the Legislative Council of Hong Kong, the Librarian of Congress, acting through the Congressional Research Service, should seek to expand educational and informational ties with the Council.

* * *

§ 5721. Continued application of United States law

(a) In general

Notwithstanding any change in the exercise of sovereignty over Hong Kong, the laws of the United States shall continue to apply with respect to Hong Kong, on and after July 1, 1997, in the same manner as the laws of the United States were applied with respect to Hong Kong before such date unless otherwise expressly provided by law or by Executive order under section 5722 of this title.

(b) International agreements

For all purposes, including actions in any court in the United States, the Congress approves the continuation in force on and after July 1, 1997, of all treaties and other international agreements, including multilateral conventions, entered into before such date between the United States and Hong Kong, or entered into before such date between the United States and the United Kingdom and applied to Hong Kong, unless or until terminated in accordance with law. If in carrying out this

subchapter, the President determines that Hong Kong is not legally competent to carry out its obligations under any such treaty or other international agreement, or that the continuation of Hong Kong's obligations or rights under any such treaty or other international agreement is not appropriate under the circumstances, such determination shall be reported to the Congress in accordance with section 5731 of this title.

* * *

§ 5722. Presidential order

(a) Presidential determination

On or after July 1, 1997, whenever the President determines that Hong Kong is not sufficiently autonomous to justify treatment under a particular law of the United States, or any provision thereof, different from that accorded the People's Republic of China, the President may issue an Executive order suspending the application of section 5721(a) of this title to such law or provision of law.

(b) Factor for consideration

In making a determination under subsection (a) of this section with respect to the application of a law of the United States, or any provision thereof, to Hong Kong, the President should consider the terms, obligations, and expectations expressed in the Joint Declaration with respect to Hong Kong.

(c) Publication in Federal Register

Any Executive order issued under subsection (a) of this section shall be published in the Federal Register and shall specify the law or provision of law affected by the order.

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(d) Termination of suspension

An Executive order issued under subsection (a) of this section may be terminated by the President with respect to a particular law or provision of law whenever the President determines that Hong Kong has regained sufficient autonomy to justify different treatment under the law or provision of law in question. Notice of any such termination shall be published in the Federal Register.

* * *

§ 5723. Rules and regulations

The President is authorized to prescribe such rules and regulations as the President may deem appropriate to carry out this chapter.

* * *

§ 5724. Consultation with Congress

In carrying out this subchapter, the President shall consult appropriately with the Congress.

* * *

§ 5731. Reporting requirement

Not later than March 31, 1993, March 31, 1995, March 31, 1996, March 31, 1997, March 31, 1998, March 31, 1999, and March 31, 2000, the Secretary of State shall transmit to the Speaker of the House of Representatives and the chairman of

the Committee on Foreign Relations of the Senate a report on conditions in Hong Kong of interest to the United States. This report shall cover (in the case of the initial report) the period since October 5, 1992, or (in the case of subsequent reports) the period since the most recent report pursuant to this section and shall describe —

(1) significant developments in United States relations with Hong Kong, including a description of agreements that have entered into force between the United States and Hong Kong;

(2) other matters, including developments related to the change in the exercise of sovereignty over Hong Kong, affecting United States interests in Hong Kong or United States relations with Hong Kong;

(3) the nature and extent of United States-Hong Kong cultural, education, scientific, and academic exchanges, both official and unofficial;

(4) the laws of the United States with respect to which the application of section 5721(a) of this title has been suspended pursuant to section 5722(a) of this title or with respect to which such a suspension has been terminated pursuant to section 5722(d) of this title, and the reasons for the suspension or termination, as the case may be;

(5) treaties and other international agreements with respect to which the President has made a determination described in the last sentence of section 5721(b) of this title, and the reasons for each such determination;

(6) significant problems in cooperation between Hong Kong and the United States in the area of export controls;

(7) the development of democratic institutions in Hong Kong; and

(8) the nature and extent of Hong Kong's participation in multilateral forums.

* * *

§ 5732. Separate part of country reports

Whenever a report is transmitted to the Congress on a country-by-country basis there shall be included in such report, where applicable, a separate subreport on Hong Kong under the heading of the state that exercises sovereignty over Hong Kong. The reports to which this section applies include the reports transmitted under —

(1) sections 2151n(d) and 2304(b) of this title (relating to human rights);

(2) section 2241 of Title 19 (relating to trade barriers); and

(3) section 4711 of Title 15 (relating to economic policy and trade practices).

* * *

FILED
DEC 28 1997
CLERK

No. 97-893

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MATIMAK TRADING COMPANY LIMITED,
Petitioner,
v.
ALBERT KHALILY, d/b/a UNITEX MILLS, INC., and D.A.Y. KIDS SPORTSWEAR, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

MARK R. JOELSON
Counsel of Record
JOSEPH P. GRIFFIN
GREGORY S. MENEGAZ
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7240
Counsel for the Government of the United Kingdom of Great Britain and Northern Ireland

December 29, 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-893

MATIMAK TRADING COMPANY LIMITED,
Petitioner,

v.

ALBERT KHALILY, d/b/a UNITEX MILLS, INC., and D.A.Y. KIDS SPORTSWEAR, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Having obtained the written consent of the parties pursuant to Rule 37.2 of the Rules of this Court, the Government of the United Kingdom of Great Britain and Northern Ireland ("British Government") submits this brief as *amicus curiae* in support of the petition for a writ of certiorari filed on behalf of Matimak Trading Company Limited ("Matimak").[1]

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[1] The consents are filed contemporaneously with this brief. Pursuant to Rule 37.6 of this Court, counsel for the British Government state that they have authored this *amicus curiae* brief in whole and that only the British Government has made or will make a monetary contribution to the preparation and submission of this brief.

INTEREST OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

In 1978, the Department of State, at the suggestion of the Clerk of this Court,[2] encouraged foreign governments to present their views directly to U.S. courts.[3] Since then, friendly foreign governments have relied on the State Department's position and have presented their views directly to this and other U.S. courts.

The British Government has a substantial interest in expressing to the Court its views with respect to this proceeding. The petitioner is a corporation organized under the laws of Hong Kong and has its principal place of business there. At the time pertinent to the jurisdictional issue raised by the petition, Hong Kong was a British Dependent Territory. The question presented by the petition—whether a corporation formed under Hong Kong law was at that time a "citizen or subject" of a "foreign state" for purposes of Article III of the United States Constitution and 28 U.S.C. § 1332(a)(2)—therefore turns in large part on the relationship that then existed between the United Kingdom and Hong Kong corporations. Indeed, the decision below by the United States Court of Appeals for the Second Circuit directly addresses issues of British law, including the interpretation of the British Nationality Act of 1981. *Matimak Trading Co. v. Khalily*, 118 F.3d 76, 85-86 (2d Cir. 1997).

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[2] Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), *printed in* Dep't of State, 1978 *Digest of United States Practice in International Law* 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 125 (1979).

[3] Dep't State Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), *reprinted in* Dep't of State, 1978 *Digest of United States Practice in International Law* 560, *reprinted in part in* 73 Am. J. Int'l L. 122, 124 (1979). *See also* Letter from Deputy Legal Adviser Marks (June 15, 1979), *described in* 73 Am. J. Int'l L. 669, 678-79 (1979).

Although British sovereignty over Hong Kong ended on July 1, 1997, when Hong Kong became a special administrative region of the People's Republic of China, the question of whether corporations organized under the laws of the British Dependent Territories may have access to the U.S. federal courts pursuant to alienage jurisdiction remains an important one for the British Government. There are thousands of corporations organized under the laws of those territories which would be denied access to the U.S. federal courts under the view of the alienage jurisdiction adopted by the court below. The United States and the United Kingdom are major trading partners of one another and have a close working relationship on both commercial and foreign policy matters. The British Government submits that it would not be in the interest of that relationship for the corporations of the British Dependent Territories to be excluded from the United States federal courts. It therefore appreciates the Court's consideration of this brief urging review on writ of certiorari.

STATEMENT OF THE CASE

The complete background of this proceeding has been briefed in the petition for a writ of certiorari ("Petition") filed on behalf of Matimak. The case involves a suit for breach of contract brought by Matimak, a Hong Kong corporation, against two New York corporations in the Southern District of New York. The district court dismissed the action for lack of subject matter jurisdiction on the ground that Hong Kong is not a foreign state and that hence corporations organized under its laws are not deemed subjects of a foreign state for purposes of the alienage jurisdiction of 28 U.S.C. § 1332(a)(2).[4] The Court of Appeals for the Second Circuit affirmed by a 2-1 vote. It reasoned that (1) because it was under British sovereignty as a dependent territory, Hong Kong was not

[4] *See* 936 F. Supp. 151 (S.D.N.Y. 1996), Petition Appendices B-D.

a "foreign state" under § 1332(a)(2), and (2) as an entity incorporated under Hong Kong law, Matimak's connection with the British Crown was "too attenuated." Accordingly,

> . . . Matimak is not a "citizen or subject" of a foreign state. It is thus stateless. And a stateless person—the proverbial man without a country—cannot sue a United States citizen under alienage jurisdiction.

118 F.3d 76, 86 (2nd Cir. 1997), Petition Appendix A at 20a.

Judge Altimari dissented. He reasoned that a "stateless corporation is an oxymoron" because a corporation can only be created with the imprimatur of a state. 118 F.3d at 89 (Petition Appendix A at 28a). He concluded that the alienage jurisdiction should properly be construed in such a way as to allow a Hong Kong corporation to litigate its claims in the U.S. federal courts. *Id.* at 92 (Petition Appendix at 34a). Matimak's petition for rehearing and suggestion for rehearing *en banc* were denied. Petition Appendix E.

SUMMARY OF ARGUMENT

At the time pertinent to this case, when Matimak, a Hong Kong corporation, brought suit in U.S. federal court against two New York corporations, Hong Kong was a Dependent Territory of the United Kingdom. Accordingly, the companies incorporated under Hong Kong law operated under the sovereignty of the United Kingdom. They should have been regarded as British companies, and not as stateless entities as was held by the majority of the court below. The United Kingdom's sovereignty over its Dependent Territories (which until June 30, 1997 included Hong Kong) as a matter of international law, together with the strong constitutional relationship between the United Kingdom and its Dependent Territories, lead to the conclusion that the corporations of those territories should be regarded as "subjects" of the United

Kingdom for purposes of U.S. alienage jurisdiction. The decision of the court below, if left standing, will unfairly deny access to the neutral forum provided by the U.S. federal courts to thousands of corporations organized in the remaining British Dependent Territories. As a matter of international comity and reciprocity, the United States should afford to corporations organized under the laws of the British Dependent Territories the same access to its courts as is provided by the British courts to corporations established in the U.S. territories.

ARGUMENT

I. INTRODUCTION

This case raises important questions concerning whether the availability and protection of the U.S. federal courts will be denied to the numerous corporations organized under the laws of the British Dependent Territories, which are territories under the sovereignty of the United Kingdom and whose laws are derived from United Kingdom legislation. The court below, by a 2-1 vote, has denied this access through applying a needlessly narrow and technical interpretation of the United States Code. The British Government urges this Court to grant certiorari and to reverse this decision in the interests of international comity.

II. THE UNITED KINGDOM HAS SOVEREIGNTY IN INTERNATIONAL LAW OVER ITS DEPENDENT TERRITORIES, AND THIS IS EXERCISED THROUGH THE CLOSE CONSTITUTIONAL RELATIONSHIP WHICH EXISTS BETWEEN THE UNITED KINGDOM AND THOSE TERRITORIES

The Dependent Territories of the United Kingdom are territories over which the United Kingdom has sovereignty in international law. This sovereignty is exercised through the close constitutional relationship which exists between the United Kingdom and its Dependent Territories. Until

July 1, 1997, Hong Kong was such a Dependent Territory.[5] The Constitutions of the Dependent Territories are set out in United Kingdom legislation. The Constitutions of the Dependent Territories contain, among other matters, provision with regard to the office of the Governor, the Executive Council and the Legislature. The legislation commonly takes the form of an Order in Council made under the authority of a United Kingdom statute or under the Royal Prerogative. In the case of Hong Kong, the legislative basis for the Constitution was letters patent made under the Royal Prerogative.

Under the Constitutions of the Dependent Territories (including, formerly, that of Hong Kong), the Governor of the territory is appointed by The Queen. The Governor has such powers as are conferred by the Constitution, as well as such other powers as The Queen may, from time to time, assign to him or her. The Governor must carry out his or her duties in accordance with such instructions, if any, as Her Majesty may, from time to time, see fit to give him or her. In practice, instructions are given to the Governor through the Secretary of State for Foreign & Commonwealth Affairs. In general, the Governor must exercise his or her functions in accordance with the advice of the Executive Council but remains responsible in his or her discretion for defense, external affairs, internal security, the police and certain matters relating to the public service.

The Governor may make laws with the advice and consent of the local Legislature and no Bill can become

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[5] At present, the Dependent Territories comprise the following territories: Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, The British Virgin Islands, The Cayman Islands, The Sovereign Base Areas in Cyprus, The Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena and dependencies, South Georgia and South Sandwich Islands, and the Turks and Caicos Islands. The Channel Islands and the Isle of Man are also territories over which the United Kingdom has sovereignty. They are termed "Crown dependencies" and have a broadly similar constitutional relationship with the United Kingdom.

law until the Governor has assented to it on behalf of The Queen. Moreover, any law to which the Governor has given his or her assent may be disallowed by Her Majesty through a Secretary of State of the United Kingdom Government. In addition, power is reserved by The Queen to make laws for the territory with the advice of Her Privy Council for the peace, order and good government of the territory.[6] Ultimate legislative authority over the Dependent Territories is vested in the United Kingdom Parliament.

All laws of the Dependent Territory, including those relating to the incorporation of companies, are made under and have effect by virtue of the foregoing provisions.

III. CORPORATIONS OF THE BRITISH DEPENDENT TERRITORIES SHOULD BE CONSIDERED "SUBJECTS" OF THE UNITED KINGDOM FOR PURPOSES OF THE ALIENAGE JURISDICTION OF 28 U.S.C. § 1332

The British Dependent Territories are at all times under the sovereignty of the United Kingdom, and there is a distinct and strong constitutional relationship between the territories and the United Kingdom itself. They should therefore be regarded for the purposes of the U.S. alienage jurisdiction as part of a foreign State (the United Kingdom). The British Government submits that, in the last analysis, as the Brief For The United States As Amicus Curiae in the court below correctly pointed out with respect to Hong Kong, the corporations of the British Dependent Territories are "subjects" of United Kingdom sovereignty.[7] The majority in the court below acknowl-

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[6] In the case of Bermuda, the power of disallowance is more limited, and there is no power reserved to The Queen to legislate for peace, order, and good government.

[7] Brief For The United States As Amicus Curiae, filed in the court below in November 1996 at 6-7.

edged that a foreign state is entitled to define who are its citizens or subjects. 118 F.3d at 85. Nonetheless, its analysis of the relation between the United Kingdom and the corporations organized under the laws of the British Dependent Territories was not sound. As the majority opinion noted,[8] the corporations in the British Dependent Territories are not considered to be British "citizens" under British law. However, in their capacity as juridical persons, they must be considered "subjects" of the United Kingdom.

It appears to the British Government to be illogical and unfair to deem corporations organized under the laws of the Dependent Territories to be "stateless," as the court below has done, and hence as excluded from the benefits of the alienage jurisdiction of the U.S. federal courts. In contrast, the United States Court of Appeals for the Seventh Circuit was correct, in *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1243 (7th Cir. 1990), when it characterized such an approach as allowing form to prevail over substance. Indeed, that court further observed:

> Certainly, the exercise of American judicial authority over the citizens of a British Dependent Territory implicates this country's relationship with the United Kingdom—precisely the raison d'etre for applying alienage jurisdiction.

Id.

Well-established principles of international law provide that every corporation is a national of the state under the laws of which it was created. *Restatement (Third) of the Foreign Relations Law of the United States* § 213 and comment c (1987). Organized under the laws of a Dependent Territory of the United Kingdom, Matimak should have been viewed as a British company and not as stateless. The concept of "statelessness" applied by the court

[8] 118 F.3d at 85-86.

below traditionally has been used in the context of individuals (*e.g.*, loss of citizenship, refugees) or ships on the high seas not clearly under the flag of a distinct sovereign. It makes no sense to apply that concept in a manner contrary to the law of nations in a situation of this international importance.

Under United Kingdom law, the nationality of a company depends on its place of incorporation. From this, it should follow that companies incorporated in the Dependent Territories under the sovereignty of the United Kingdom are regarded as British companies, rather than as stateless entities. While the British Government is not an authority on whether such companies are "subjects" or "citizens" of a foreign state as a matter of U.S. law, it believes it to be fair and appropriate that they should be considered "subjects," if not "citizens," of the United Kingdom for purposes of the alienage jurisdiction.

In addition to disagreeing with the conclusion of the court below on this point, the British Government respectfully takes issue with several of the findings and assumptions of that court which apparently formed the basis for its holding. The court majority opined that "there is no danger of foreign entanglements [here], as there is no sovereign with whom the United States could become entangled." 118 F.3d at 87. That this assumption was incorrect is evidenced by this brief *amicus curiae*. Moreover, the court majority expressed the view that "[i]f a foreign state has determined that a person is not entitled to citizenship it should certainly be unconcerned with that person's treatment in a court in the United States." *Id.* On the contrary, the fact that Hong Kong citizens or corporations did not enjoy precisely the same rights as citizens of the United Kingdom should not be dispositive. The United Kingdom is keenly concerned that the citizens and corporations of its Dependent Territories be able to bring and defend suits in neutral foreign fora concerning their global commerce.

The corporations of the territories of the United States presumably have some formal attributes by reason of their links with those territories that may differentiate them from the corporations of the U.S. states themselves. British courts do not focus on these distinctions. Any corporation which is validly incorporated under the laws in force in the place of its incorporation has the capacity to sue and be sued in the British courts. See, *e.g.*, 2 Albert Venn Dicey & John Humphrey Morris, *Conflict of Laws* 1107 (12th ed. 1993). As a matter of international comity and reciprocity, the United States should afford to corporations organized under the laws of the British Dependent Territories the same access to its courts as is provided by the British courts to corporations established in the U.S. territories.

IV. THE ASSURED NEUTRAL FORUM AFFORDED BY THE U.S. FEDERAL COURTS IS IMPORTANT TO THE CORPORATIONS ORGANIZED UNDER THE LAWS OF THE BRITISH DEPENDENT TERRITORIES

Although on July 1, 1997 Hong Kong ceased to be a territory under the sovereignty of the United Kingdom, the decision of the court below to the effect that Hong Kong corporations could not be considered "subjects of a foreign state" will, if left standing, have serious repercussions for the interests of other United Kingdom Dependent Territories in that companies incorporated in those territories will be denied the right of access to U.S. federal courts. The impact will be most severe on the Caribbean Dependent Territories and Bermuda, where substantial business is conducted with the United States by companies incorporated in those territories. To give an example, as of May this year there were 563 banks incorporated in the Cayman Islands, 377 insurance companies and 33,792 business companies. There were 1,400 insurance companies incorporated in Bermuda and 6,824 business companies. In the British Virgin Islands there were 130,000

business companies incorporated and in the Turks and Caicos Islands 1,911 insurance companies and 11,000 business companies.

As the British Government understands it, the alienage jurisdiction reflected in 28 U.S.C. § 1332(a)(2) was adopted to ensure that the "citizens" and "subjects" of foreign states had access to a neutral forum if they became embroiled in litigation in the United States with U.S. citizens. The federal courts are intended to provide this neutral forum. The denial of access to the federal courts declared by the court below would mean not only that the affected corporations could not initiate litigation in the federal courts, as in the present case, but also that as defendants in U.S. state court actions, they could not avail themselves of the federal court removal jurisdiction under 28 U.S.C. § 1441(a). "Because litigation in any state court would create a danger of prejudice to a citizen of a foreign country, there is considerable justification for making a federal tribunal available in all cases cognizable under the Constitution in which an alien is a party." 13b Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3604 at 383 (1984).

The concern over providing a neutral forum historically focused on foreign individuals, but the rationale is equally appropriate today for the protection of foreign corporations. *See, e.g.*, Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications For Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1, 48 (1996) ("The economic justifications for alienage jurisdiction in some ways are currently stronger than at the time of the Constitutional Convention. The increasingly global economy has resulted in a vast growth of foreign trade by domestic business.") Of course, in the modern era of extended corporate international activity, the hub of transnational commercial matters is more frequently the corporation than the individual.

In sum, in the view of the British Government, it is important that the decision of the court below not be allowed to stand as a precedent. Because the principle of sensitivity to international comity that led to the adoption of the alienage jurisdiction remains fully appropriate today, the doors of the U.S. federal courts should not be narrowed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK R. JOELSON
Counsel of Record
JOSEPH P. GRIFFIN
GREGORY S. MENEGAZ
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7240
Counsel for the Government of the United Kingdom of Great Britain and Northern Ireland

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